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TOWARD A UNIFIED THEORY OF THE JURISDICTION OF THE UNITED STATES COURTS OF APPEALS*

*Thomas E. Baker***

I. INTRODUCTION, BACKGROUND, AND OVERVIEW

A. Purpose

A unified theory is one which explains a phenomenon once and for all. A grand unified theory of the universe, for example, would explain its origin and its end, and everything in between. My reader should take an immediate cue from my title that I mean this Article only as a preliminary step towards a unified theory of the jurisdiction of the United States Courts of Appeals. My purpose then is to provide an introduction to the complexities and nuances within the subject matter jurisdiction of the United States Courts of Appeals. This Article is organized into seven parts. Part I provides a brief introduction, background, and overview. Part II canvasses the procedures related to the exercise of subject matter jurisdiction. The discussion of civil appeals is divided into two parts: Part III deals with appeals from final judgments and Part IV deals with interlocutory appeals. Extraordinary writs are covered in Part V. Criminal appeals are the subject of Part VI. Part VII summarizes appellate review of the decisions of federal administrative agencies.

B. A Brief History of the Courts of Appeals

Any study of the federal courts or their jurisdiction must begin with a historical perspective.¹ More particularly, the major historical stages of the federal court system have been reflected in the creation and the reforms of

* This Article is a product of a study undertaken in furtherance of the Federal Judicial Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analysis, conclusions, and points of view are those of the author. On matters of policy, the Center speaks only through its Board. The full monograph, entitled, *A PRIMER ON THE JURISDICTION OF THE U. S. COURTS OF APPEALS*, is available from the Federal Judicial Center.

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1. See generally E. SURENCY, *HISTORY OF THE FEDERAL COURTS* (1987).

the middle tier.² Article III of the Constitution vests the federal judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."³ The original statute, the Judiciary Act of 1789,⁴ provided for two tiers of courts subordinate to the Supreme Court. On the one hand, the district courts were exclusively trial courts of limited jurisdiction.⁵ The circuit courts, on the other hand, were the principal trial courts with original jurisdiction over more serious criminal offenses, diversity suits above a set figure, and cases in which the United States was a party.⁶ Although the Supreme Court was the principal appellate court, the circuit courts also had some appellate jurisdiction to review specified categories of district court decisions.⁷ The circuits were arranged geographically and had no judges of their own, rather, two Supreme Court justices "rode circuit" to sit with a district judge as a panel.⁸ Soon afterwards, Congress reconstituted the circuit courts so as to require a panel of one justice and one district judge in order to lessen the travel burden on the justices.⁹

The famous, though short-lived, "Midnight Judges" Act¹⁰ in 1801 would have created circuit judgeships and three-judge panels for each of the newly-numbered six circuits.¹¹ In response to this alleged early Federalist effort at

2. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 Sw. L.J. 687, 688 (1981) (tracing the historical development of the federal courts of appeal as a background for discussion of the fifth circuit).

3. U.S. CONST. art. III, § 1.

4. Act of September 24, 1789, ch. 20, 1 Stat. 73.

5. Act of September 24, 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (provided that district courts' exclusive jurisdiction was limited, for example, to jurisdiction over minor crimes, civil causes of admiralty and maritime jurisdiction, seizures of land, *et cetera*).

6. *Id.* § 11, at 78-79 (circuit courts had original jurisdiction where the matter in controversy exceeded \$500.00).

7. *Id.* § 11, at 79.

8. *Id.* § 4, at 74.

9. Act of March 2, 1793, ch. 22, 1 Stat. 333 (providing that the attendance of one justice was sufficient except in certain cases).

10. Act of February 13, 1801, ch. 4, 2 Stat. 89, *repealed by* Act of April 29, 1802, ch. 31, 2 Stat. 156.

11. The "Midnight Judges" Act provided in pertinent part:

The said districts shall be classed into six circuits in manner following The first circuit shall consist of the districts of Maine, New Hampshire, Massachusetts and Rhode Island; the second, of the districts of Connecticut, Vermont, Albany and new York; the third, of the districts of Jersey, the Eastern and Western districts of Pennsylvania and Delaware; the fourth, of the districts of Maryland, and the Eastern and Western districts of Virginia; the fifth, of the districts of North Carolina, South Carolina and Georgia; and the sixth, of the districts of Eastern Tennessee, Western Tennessee, Kentucky and Ohio.

Id. § 6, at 90.

The statute further provided: "[T]hat there shall be in each of the aforesaid circuits, except the sixth circuit, three judges of the United States to be called circuit judges, one of whom shall be commissioned as chief judge" *Id.* For additional discussion of this act, see Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961).

"court-packing," the successor Jeffersonian Congress repealed the 1801 Act and returned the circuit courts to the *status quo ante*, except that their quorum was further reduced to require one district judge sitting alone.¹²

For a time, congressional attention focused only on the geography of the courts. The technical duty of riding circuit continued for the justices, which obliged Congress to add to the membership of the Supreme Court in order to accommodate western expansion and the creation of new circuits. Therefore, a seventh circuit and a seventh justice were added in 1807.¹³ For a time, Congress resisted increasing the size of the Supreme Court by simply not bringing new states into the circuits.¹⁴ By 1837, however, pent-up demand resulted in the addition of a ninth justice with a concomitant redrawing of circuit lines to create nine judicial circuits.¹⁵ Not long thereafter, Congress added a tenth circuit which included the west coast states, and a tenth justice was added to the Supreme Court.¹⁶ In 1862 and in 1866, Congress again rearranged the circuits, finally settling on nine circuits.¹⁷ In 1869, for the

12. Act of April 29, 1802, ch. 31, § 4, 2 Stat. 156, 157 (redefined the six circuits and returned to the old circuit system, where two circuit courts were to be held within each district), *as amended by* Act of March 3, 1803, ch. 40, 2 Stat. 244. See H. HART, P. BATOR, D. SHAPIRO, D. MELTZER, P. MISHKIN & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 38 (3d ed. 1988) [hereinafter HART & WECHSLER] (discussing the new Act of April 29, 1802).

13. Act of February 24, 1807, ch. 16, 2 Stat. 420 (provided that the districts of Kentucky, Tennessee and Ohio shall constitute the seventh circuit), *as amended by* Act of March 22, 1808, ch. 38, 2 Stat. 477, and Act of February 4, 1809, ch. 14, 2 Stat. 516 (amendments divided Tennessee into two districts for the purpose of holding circuit courts). See HART & WECHSLER, *supra* note 12, at 36.

14. See F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT, A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (1928) (as of 1831, one-fourth of the states in the Union did not participate in the benefits of a circuit court). See also Baker, *supra* note 2, at 691 n.34, 736 (prior to the Act of March 3, 1837, eight states had been excluded from the circuit court system, including Alabama, Arkansas, Illinois, Indiana, Louisiana, Michigan, Mississippi and Missouri).

15. Act of March 3, 1837, ch. 34, 5 Stat. 176. This act provided that "[t]he Supreme Court shall consist of a chief justice, and eight associate judges, any five of whom shall constitute a quorum." In addition, the act redrew the boundaries to accommodate nine circuits, as follows. The second circuit consisted of the districts of Vermont, Connecticut and New York; the third—the districts of New Jersey, and the eastern and western districts of Pennsylvania; the fourth—the districts of Maryland and Delaware; the fifth—the districts of Virginia and North Carolina; the sixth—the districts of South Carolina and Georgia; the seventh—the districts of Ohio, Indiana, Illinois and Michigan; the eighth—the districts of Kentucky, east and west Tennessee, and Missouri; and the ninth—the districts of Alabama, the eastern district of Louisiana, and the districts of Mississippi and Arkansas. *Id.* § 1, at 176-77.

16. Act of March 2, 1855, ch. 142, 10 Stat. 631; Act of March 3, 1863, ch. 100, 12 Stat. 794, *as amended by* Act of February 19, 1864, ch. 11, 13 Stat. 4 (provided that "the supreme court of the United States shall hereafter consist of a chief justice and nine associate justices, any six of whom shall constitute a quorum; . . . [and] [t]he districts of California and Oregon shall constitute the tenth circuit"; repealing that portion of the Act of March 2, 1855 that established a circuit court of the United States in the State of California).

17. Act of July 15, 1862, ch. 178, 12 Stat. 576 (redrew the circuits along new geographical

first time, Congress created one judgeship for each circuit and further reduced the justices' circuit-riding responsibility.¹⁸

In the period between 1870 and 1891, federal court litigation increased dramatically, as a result of geographical expansion, population growth, commercial development and congressional extensions of jurisdiction.¹⁹ When House and Senate reformers could not agree on how to respond they did nothing, and the courts were hard-pressed to keep up with their work.²⁰ The country had become too large for circuit-riding to be a feasible duty for the justices. Moreover, a complement of only ten circuit judges²¹ could not realistically supervise the growing number of district courts, which by then had reached sixty-five districts.²² Consequently, an appeal from a district court decision to a circuit court panel comprised of the one district judge was viewed realistically as a waste of time. Furthermore, appeals from the circuit court to the Supreme Court were almost eliminated, as well, by statute.²³

lines, so that the fourth circuit included the districts of Maryland, Delaware, Virginia and North Carolina; the fifth circuit contained the districts of South Carolina, Georgia, Alabama, Mississippi and Florida; the sixth circuit contained the districts of Louisiana, Texas, Arkansas, Kentucky and Tennessee; the seventh circuit contained the districts of Ohio and Indiana; the eighth circuit contained the districts of Michigan, Wisconsin and Illinois and the ninth circuit contained the districts of Missouri, Iowa, Kansas and Minnesota); Act of July 23, 1866, ch. 210, 14 Stat. 209 (redrew the circuits (with the exception of the first and second circuits) along new geographical lines to make the following changes: the third circuit included the districts of Pennsylvania, New Jersey and Delaware; the fourth included the districts of Maryland, West Virginia, Virginia, North Carolina, South Carolina; the fifth included the districts of Georgia, Florida, Alabama, Mississippi, Louisiana and Texas; the sixth included the districts of Ohio, Michigan, Kentucky and Tennessee; the seventh included the districts of Indiana, Illinois and Wisconsin, the eighth included the districts of Minnesota, Iowa, Kansas and Arkansas; and the ninth included the districts California, Oregon and Nevada). The Act of July 23, 1866 also reduced the Supreme Court to six associates and one Chief Justice, any four of whom constituted a quorum. This change lasted until the Act of April 10, 1869, ch. 22, 16 Stat. 44, when the Supreme Court was restored to nine.

18. Act of April 10, 1869, ch. 22, 16 Stat. 44. This Act returned the number of Supreme Court justices to nine; one "Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum." In addition, Congress appointed a circuit judge for each of the nine existing circuits "who shall reside in his circuit, and shall possess the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit." *Id.*

19. See HART & WECHSLER, *supra* note 12, at 36-37 (for discussion of geographical expansion).

20. See F. FRANKFURTER & J. LANDIS, *supra* note 14, at 60 (citing Rep. of Att'y Gen. for 1890 (noting that from 1870 to 1890, the number of cases pending in the circuit and district courts nearly doubled)).

21. In 1887, a tenth circuit judge was added to sit in the second circuit. Act of March 3, 1887, ch. 347, 24 Stat. 492.

22. See F. FRANKFURTER & J. LANDIS, *supra* note 14, at 87.

23. See 12 J. MOORE, H. BENDIX & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 400.06 [8.-7] (2d ed. 1989) [hereinafter 12 MOORE'S FEDERAL PRACTICE] (discusses stages of statutory elimination of direct appeal to the Supreme Court); E. CHERMERINSKY, FEDERAL JURISDICTION § 1.4 (1989) (discussing changes in Supreme Court jurisdiction, particularly increases in both jurisdiction and discretion). For a comprehensive discussion of Supreme Court review, see *id.* ch. 10, §§ 10.1-10.5.

With the Circuit Court of Appeals Act of 1891,²⁴ commonly known as the Evarts Act, Congress made a long overdue structural change that marked the modern organization of the federal courts.²⁵ The 1891 Act created a circuit court of appeals for each circuit composed of two circuit judges (a second judgeship was created in each circuit) and either one circuit justice or one district judge.²⁶ The old circuit courts continued as trial courts, but their appellate jurisdiction was transferred to the newly-created circuit courts of appeals.²⁷ A second appeal as of right to the Supreme Court from the circuit court of appeals was limited both by subject matter and by an amount in controversy requirement.²⁸ In the remaining cases, the circuit court of appeals' decision was final, subject only to discretionary review by the Supreme Court either by a writ of certiorari or by certification.²⁹ The structure was further streamlined in 1911, when the by-then anachronistic circuit courts were abolished and their trial jurisdiction was transferred to

24. Act of March 3, 1891, ch. 517, 26 Stat. 826.

25. E. SURRENCY, *supra* note 1, at 245 (establishment of the circuit courts of appeals relieved the Supreme Court docket).

26. The Act of March 3, 1891, provided in pertinent part:

[T]here shall be appointed by the President of the United States, by and with the consent of the Senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have

SEC. 2 That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum and which shall be a court of record with appellate jurisdiction

SEC. 3 That the Chief-Justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals

In case the full court at any time shall not be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court

Provided, that no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing court, shall sit on the trial or hearing of such cause in question in the circuit court of appeals.

Act of March 3, 1891, ch. 517, 26 Stat. 826 (emphasis in original).

27. The Act of March 3, 1891, ch. 517, § 4, 26 Stat. 826, 827, eliminated the appellate jurisdiction of the old circuit courts. However, the statute did not expressly remove the existing circuit courts' original jurisdiction, which remained until the courts were abolished by the Judiciary Act of 1911. Originally, the first circuit courts had original jurisdiction over all matters not expressly reserved for the district courts. *See* Act of September 24, 1789, ch. 20, § 9, 1 Stat. 73. This Act gave the district courts exclusive jurisdiction in admiralty cases, minor criminal offenses, and other limited areas. The circuit courts, then, had original jurisdiction over all other matters, until 1911. *See infra* note 30.

28. Act of March 3, 1891, ch. 517, § 6, 26 Stat. 827, 828. This section limited appeals as of right to the Supreme Court from the circuit courts of appeals to matters where the amount in controversy exceeded one thousand dollars. The subject matter was limited to "all cases not hereinbefore, in this section, made final"

29. *Id.*

the district courts.³⁰ In 1925, Congress dramatically expanded the Supreme Court's discretion over its docket.³¹ Thus, the modern structure contemplates that the district courts shall conduct initial trials, the courts of appeals shall hear appeals as of right, and the Supreme Court shall enjoy the discretionary final review.

The federal court system has not evolved much beyond its 1911 structure, with the exception of new geographical lines.³² In the 1948 Judicial Code, the circuit courts of appeals were renamed the courts of appeals for the various circuits.³³ Congress added a tenth circuit in 1929,³⁴ an eleventh circuit in 1981,³⁵ and created the Federal Circuit in 1982.³⁶ Of course, one of the

30. Act of March 3, 1911, ch. 231, Pub. L. No. 61-475, 36 Stat. 1087. The 1911 Act codified, revised, and amended the laws relating to the judiciary. It redrew the old court system and left the old circuits out, effectively abolishing them. In addition, it focused on the newly-revised district courts, giving them extensive original jurisdiction. Section 24 contains the jurisdictional grant, extending to:

[A]ll suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or such shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens or subjects

Id. The statute excepted a long list of cases from the value requirement. For example, criminal cases, cases arising under slave trade laws, postal suits and civil rights suits did not need to meet the value requirement. *See also* *Textile Mills Corp. v. Commissioner*, 314 U.S. 326, 329 (1941) (noting that the Judicial Code, Act of March 3, 1911, ch. 231, 36 Stat. 1087, § 297, abolished the existing circuit courts).

31. Act of February 13, 1925, ch. 229, Pub. L. No. 68-415, 43 Stat. 936. Before this Act, any circuit court decision not made final could be taken to the Supreme Court on writ of appeal or error, with review nearly mandatory. *See* E. SURRENCY, *supra* note 1, at 252. After this Act, "except for areas where Congress mandated an appeal to the Supreme Court, the [court of appeals] became the final appellate court unless the Supreme Court decided in its discretion to issue certiorari to review a case. . . . This bill established the Supreme Court as a court to determine policy questions of national concern." *Id.*

32. *See infra* notes 34-36 and accompanying text.

33. Judicial Code of 1948, 28 U.S.C. § 43(a) (1982).

34. Act of February 28, 1929, Pub. L. No. 70-840, 45 Stat. 1346. This act provided for ten judicial circuits, constituted as follows: the first circuit included the districts of Rhode Island, Massachusetts, New Hampshire, Maine and Puerto Rico; the second—the districts of Vermont, Connecticut and New York; the third—the districts of Pennsylvania, New Jersey & Delaware; the fourth—the districts of Maryland, Virginia, West Virginia, North Carolina and South Carolina; the fifth—the districts of Georgia, Florida, Alabama, Mississippi, Louisiana and Texas; the sixth—the districts of Ohio, Michigan, Kentucky and Tennessee; the seventh—the districts of Indiana, Illinois and Wisconsin; the eighth—the districts of Minnesota, North Dakota, South Dakota, Iowa, Arkansas, Nebraska and Missouri; the ninth—the districts of California, Oregon, Nevada, Washington, Idaho, Montana, Hawaii and Arizona; the tenth—the districts of Colorado, Wyoming, Utah, Kansas, Oklahoma and New Mexico.

35. Act of October 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994. This Act split the fifth circuit as follows. The new fifth circuit included the District of the Canal Zone, Louisiana, Mississippi and Texas. The new eleventh circuit included Alabama, Florida and Georgia.

36. Act of April 2, 1982, Pub. L. No. 97-164, 96 Stat. 25.

most currently controverted issues is whether the nearly one hundred year old structure is adequately serving the nation's needs or whether a new national court system should be created.³⁷

Two lessons relevant here may be gleaned from this brief historical account. First, the evolution of our federal court structure demonstrates a congressional preoccupation with the middle tier—today the courts of appeals for the various circuits. Their jurisdiction significantly regulates the flow of cases up to the Supreme Court and at the same time allows for the direct supervision of the district courts. Second, an understanding of the historical function of the intermediate court can shed light on their current jurisdiction. For example, the circuit courts were originally both trial and appellate tribunals. As a consequence, some aspects of each function remain. Their position in the middle orients them simultaneously toward the high Court and the trial court. Until recently, their function was understood to be to correct errors, and it was deemed to be the function of the Supreme Court to declare law and to achieve uniformity.³⁸ Docket growth, however, has rendered the courts of appeals more autonomous in the federal hierarchy.³⁹ Consequently, their final power to declare law has grown. Subject matter jurisdiction—the judicial power—cannot be understood in the abstract or without some appreciation for role or function.⁴⁰

C. *Limited Jurisdiction*

At the outset, it merits special reiteration: "It is a principle of first importance that the federal courts are courts of limited jurisdiction."⁴¹ Thus,

37. Compare, e.g., Baker & McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1408 (1987) (favoring a new national court of appeals and criticizing the current "percolation" of conflicts) with Ginsburg & Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417 (1987) (arguing against a new national court of appeals and that the "percolation" approach allows the Supreme Court to provide better reasoned opinions).

38. See Baker & McFarland, *supra* note 37, at 1405 (discussing the respective functions of the courts of appeals and the Supreme Court).

39. *Id.* "During the last 25 years, appeals to the courts of appeals have increased ninefold; a caseload of 3,713 in 1960 grew to 33,360 in 1985." See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1960 ANNUAL REPORT 2; DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1985 ANNUAL REPORT 2. As a result of this growth, the Supreme Court's power to achieve uniformity is greatly diminished.

40. See generally Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507 (1969) (favors appellate review); Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 752 (1957) (arguing that appellate courts have created new procedural devices to gain more control; in particular: "review by the appellate court of the size of verdicts; orders for a new trial where the verdict is thought to be contrary to the clear weight of the evidence; refusal to be bound by findings of fact of the trial judge based on documentary evidence; and expanded use of the extraordinary writs of mandamus and prohibition to control the trial court in its discretionary actions as to the procedure by which a case is to be handled.").

41. C. WRIGHT, THE LAW OF FEDERAL COURTS § 7, at 22 (4th ed. 1983) (comparing federal courts of limited jurisdiction, where plaintiff must demonstrate that court has jurisdiction, to

in effect, every federal court decision is a kind of precedent in federal jurisdiction, for a federal court must conclude, either explicitly or implicitly, that it has the power to decide before it may decide. From the time of the framers, the federal jurisdiction inquiry has been twofold: first, to determine whether the case falls within the judicial power of article III,⁴² and second, to determine whether the case falls within some particular enabling act of Congress.⁴³ There is no presumption of subject matter jurisdiction in the federal court system similar to that in the state court system. Rather, just the opposite is true. As a court of limited jurisdiction of a limited sovereign, federal jurisdiction is presumed lacking unless the invoking party demonstrates the court's constitutional and statutory power to decide the case.⁴⁴ The Supreme Court has made this self-executing duty of the court of appeals quite clear: "An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."⁴⁵

As with any other federal court, the power of the courts of appeals is limited in its jurisdictional power by the constitutional principles that elaborate upon various aspects of the case or controversy requirement contained

state courts of general jurisdiction, where jurisdiction is presumed unless shown not to exist). See generally 13 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE & PROCEDURE: JURISDICTION* 2d § 3522 (2d ed. 1984) [hereinafter *FEDERAL PRACTICE & PROCEDURE*] (federal courts may hear only those cases that (1) are within the judicial power of the United States, as defined by the Constitution; and, (2) that have been entrusted to them by a jurisdictional grant by Congress), citing *Compagnie des Bauxites de Guinee v. Insurance Corp. Of Ireland, Ltd.*, 456 U.S. 1105 (1982); 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶¶ 60[1],[3]-[4] (2d ed. 1989) [hereinafter 1 *MOORE'S FEDERAL PRACTICE*]. See, e.g., *Nieto v. Ecker*, 845 F.2d 868, 871 (9th Cir. 1988) (refusing to recast plaintiff's state tort claim as federal ERISA action, absent explicit directive from Congress, 'because federal courts are "courts of limited jurisdiction [and the] power to adjudicate claims is limited to that granted by Congress'; *In re Estate of Sheppard*, 658 F. Supp. 729, 733-34 (C.D. Ill. 1987) (petitioner sought removal of state probate proceeding to federal district court under 28 U.S.C. § 1441(a)(c), on grounds ERISA involved in suit but court held no jurisdiction because petitioner's interest (as employer) not protected by ERISA, thus no clear legislative mandate for federal jurisdiction and such jurisdiction would have allowed petitioner to enter court by indirect means when could not do so directly).

42. U.S. CONST. art. III, § 2. See also 13 *FEDERAL PRACTICE & PROCEDURE*, *supra* note 41, at § 3521 (2d ed. 1984) (explaining constitutional basis of judicial power of federal courts).

43. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 442 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers."); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) ("statute cannot extend the jurisdiction beyond the limits of the Constitution."); "As preliminary to any investigation of the merits . . . this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807) (Marshall, C.J.).

44. See *supra* note 41 and accompanying text.

45. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). See also *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981) ("a court lacks discretion to consider the merits of a case over which it is without jurisdiction.").

in article III, such as the doctrines of standing and mootness.⁴⁶ When these doctrines are unsatisfied, it would not merely be an error of discretion for the court to decide an appeal, it would be a violation of the Constitution. Such an action of excess, by any federal court, offends the constitutional principle of limited federal sovereignty and thereby encroaches on the sovereign power of the states to order their state judicial systems. While this Article will necessarily discuss some of these constitutional principles, for the relatively few cases in which events first trigger them on appeal, they otherwise will not be emphasized. These principles are more typically contested at the district court level and form the stuff of issues on the merits of direct appeals.

That the Constitution limits appellate jurisdiction does not imply that there is a constitutional right to an appeal. Rather, according to Supreme Court dicta (never directly tested) and the hornbook wisdom (often skeptically expressed),⁴⁷ the Constitution does not guarantee an appeal as of right in either civil or criminal matters. For the most part, any effort to understand the jurisdiction of the courts of appeals is an exercise in statutory interpretation and, therefore, will be the emphasis here.

D. Rules of Precedent

The individual courts of appeals have developed something of an artificial autonomy in their *stare decisis*. When Congress first created circuit judgeships in 1891, the circuit courts of appeals were designed to correct error and the judicial lawmaking function was reserved for the Supreme Court.⁴⁸ When federal dockets grew, Congress simply added more judges. The addition of more and more judges resulted in more permutations of three judge panels. These permutations posed a threat to two institutional values: uniformity

46. See generally 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3902 (1976) (discussing special limits on jurisdiction—standing); 7 (Part 2) J. MOORE, J. LUCAS & K. SKINNER, MOORE'S FEDERAL PRACTICE ¶ 65.17 (2d ed. 1989) [hereinafter 7 (Part 2) MOORE'S FEDERAL PRACTICE] (discussing standing to sue, justiciability and related matters); E. CHERINSKY, *supra* note 23, ch. 2 at §§ 2.1-2.6.8 (discussing justiciability; constitutional and prudential limitations on federal judicial power).

47. E.g., W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 26.1 (1985) (citing *McKane v. Durston*, 153 U.S. 684, 687 (1894) ("An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal . . . [it] is wholly within the discretion of the State to allow or not to allow such a review.")); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 13.10, at 516-20 (3d ed. 1986). See, e.g., *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("there is, of course, no constitutional right to an appeal"); *Ross v. Moffitt*, 417 U.S. 600, 610, 617-18 (1974) (no constitutional right to counsel for discretionary appellate review). But see *Jones v. Barnes*, 463 U.S. at 754 (Blackmun, J., concurring) (no need to decide in this case whether there is or is not a constitutional right to a first appeal of a criminal conviction); Hood, *The Right of Appeal*, 29 LA. L. REV. 498 (1969) ("[although] our Federal Constitution does not guaranty [sic] any such right, the courts in Louisiana . . . have held that the right of appeal is a 'constitutional right'").

48. Act of March 3, 1891, ch. 517, 26 Stat. 826.

among panel decisions and effective control over the law of the circuit by the majority of its judges. The first administrative mechanism designed to turn back the threat of disuniformity was the *en banc* rehearing before all the judges of the circuit.⁴⁹ As the years passed and circuit dockets exploded, *en banc* rehearsings proved inefficient and ineffective, for they added delay and expense and consumed premium judicial resources. Therefore, the so-called "rule of interpanel accord" was developed as a variant of *stare decisis* to preserve uniformity and majority control and to avoid too frequent empaneling of the *en banc* court.⁵⁰ This rule, sometimes called "the law of the circuit," obliges a three-judge panel to treat earlier panel decisions as binding authority absent intervening *en banc* or Supreme Court decisions on the issue.⁵¹ Decisions of sister courts of appeals, on the other hand, are deemed merely persuasive. Thus, each court of appeals has developed a parallel but independent *stare decisis*.⁵²

49. See *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941) (holding circuit courts have power to sit *en banc*). The Court's decision was later codified in the Judicial Code of 1948, currently found at 28 U.S.C. § 46(c) (1982). This section provides:

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges, . . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.

For an interpretation of section 46(c), see *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247 (1953). In *Western Pac. R.R. Corp.*, the Supreme Court held that section 46(c) "neither forbids nor requires each active member of a court of appeals to entertain each petition for a hearing or rehearing *en banc*. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing." *Id.* at 250. Parties, then, have no right to a rehearing *en banc*. Rather, each court of appeals has discretion to order such a hearing. See also McFeeley, *En Banc Proceedings in the United States Courts of Appeals*, 24 IDAHO L. REV. 255, 257 n.18 (1988) (discussing history of *en banc* proceedings, citing *Western Pac. R.R. Corp.*, 345 U.S. at 250-51, for proposition that section 46(c) is "but a legislative ratification" of *Textile Mills*).

50. Under the "rule of interpanel accord," one panel is not free to reconsider a decision by another panel. Accordingly, until the decision of the other panel is overruled by the full court sitting *en banc*, it remains the law of the circuit. See McFeeley, *supra* note 49, at 262 n.42, citing, e.g., *Barnes v. Kline*, 759 F.2d 21, 40 (D.C. Cir. 1984) (one panel not free to reconsider decision by another panel until overruled by full court sitting *en banc*), *vacated sub nom. on other grounds*, *Burke v. Barnes*, 479 U.S. 361 (1987); *United States v. Oyarzun*, 760 F.2d 570, 576-77 (5th Cir. 1985) (appellate panel bound by prior decisions absent *en banc* reconsideration); *United States v. Gottesman*, 724 F.2d 1517, 1523 (11th Cir. 1984) (request for reconsideration of prior decision "more properly directed to the *en banc* court, not to this panel.") (emphasis added). But see *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036, 1044-45 (4th Cir.) (where *en banc* review prevented by disqualification of all but one of the active judges of the court and case implicated serious state and federal interests, strict application of rule of interpanel accord was unwarranted), *cert. denied*, 434 U.S. 874 (1977).

51. See McFeeley, *supra* note 49, at 262 n.42.

52. See *United States v. Rodriquez-Cardenas*, 866 F.2d 390 (11th Cir. 1989) (court rejected second and sixth circuit sixth amendment interpretations because bound by eleventh circuit precedent); *United States v. Kelley*, 864 F.2d 569, 577 (7th Cir. 1989) (seventh circuit not bound by ninth circuit precedent), *cert. denied*, 110 S. Ct. 55 (1989). See generally McFeeley, *supra*

The current rules of precedent for the jurisdiction of the courts of appeals are merely an application of this balkanized *stare decisis*. Decisions of the Supreme Court interpreting the federal jurisdictional statutes are, of course, binding upon each court of appeals. Jurisdictional decisions by a particular court of appeals, however, directly bind that court only. Although precedent concerning the jurisdiction of the court of appeals from sister circuits is most often used interchangeably, not all the nuance of one circuit's precedent necessarily translates to another circuit. Research therefore needs to be done on a circuit-by-circuit basis.

There is a related subtlety of jurisdictional *stare decisis* between the Supreme Court and the courts of appeals. Supreme Court jurisdiction to review state court decisions is couched in statutory language of "final judgments and decrees" nearly identical to the courts of appeals statutory grant of jurisdiction to review "all final decisions of the district court," although the complications of interlocutory review found in the court of appeals schema do not apply to Supreme Court review of state court decisions.⁵³ Decisions under the two statutes are most frequently cited interchangeably, implying a common meaning.⁵⁴ However, there are some complexities that apply in each context—state court to Supreme Court or district court to court of appeals—that militate against a wholly indiscriminate cross application.⁵⁵ It is nonetheless sufficient for present purposes to note the general rule and to caution against wholly indiscriminate cross-reference.⁵⁶

note 49, at 255; Note, *En banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities* (pts 1 & 2), 40 N.Y.U. L. REV. 563, 726 (1965); Annotation, *In Banc Proceedings in Federal Courts of Appeals*, 37 A.L.R. FED. 274 (1978).

53. Compare 28 U.S.C. § 1257 (1982) (criteria for review of final decisions of state courts by Supreme Court) with § 1291 (giving jurisdiction to the courts of appeals to hear appeals from district court decisions).

54. E.g., *National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 44 (1977) (held order of a *state supreme court* was final judgment for purposes of Supreme Court jurisdiction, because it involved "a right 'separable from and collateral to,' the merits," but relied on *Cohen v. Beneficial Loan Corp.* 337 U.S. 541, 546 (1949), where the court's decision was based on section 1291, not section 1257, and rather than state court appeal, allowed appeal from *federal district court* decision); *Gillespie v. United State Steel Corp.*, 379 U.S. 148, 152-54 (1964) ("the requirement of finality is to be given a 'practical rather than a technical construction' and does not necessarily mean that an order, to be appealable, must be the last possible one to be made in the case").

55. See *Flanagan v. United States*, 465 U.S. 259, 265 n.3 (1984) (this case "concerns only the finality requirement of 28 U.S.C. § 1291 . . . [and] likewise does not involve the finality problems that arise in appeals from state court decisions to this Court under 28 U.S.C. § 1257"), citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In *Cox*, the appeal was from state court on a federal issue, and the issue involved whether this was a "final" decision when further proceedings remained in state court. The Court allowed the appeal to stand, using the "pragmatic approach." *Id.* at 486.

56. *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916, 922-24 (1989) (discussing four categories of cases described in *Cox*, in which a judgment is final even though further proceedings are pending in state courts). See generally 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41,

E. Scope

In order to appreciate the scope of this Article, it is useful to canvass several matters which will *not* be discussed.

First, there are a number of "second-look" procedures available in the district court. Since they are not the emphasis here, the most common may be simply listed: motion for judgment notwithstanding the verdict;⁵⁷ motion to amend or make additional findings;⁵⁸ motion for a new trial;⁵⁹ motion to alter or amend a judgment;⁶⁰ motion for relief from clerical mistake;⁶¹ motion for relief from mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, void judgment, enforcement inequity, or some "other reason";⁶² and, motion for stay of proceeding.⁶³

Second, the appellate jurisdiction of the Supreme Court is also beyond the scope of this Article.⁶⁴ Effective September 25, 1988, Congress eliminated substantially all of the Supreme Court's so-called mandatory or obligatory appellate jurisdiction which previously had authorized a direct appeal from the district court, bypassing review in the court of appeals.⁶⁵ Still, a very few of the arcane provisions for convening a three-judge district court with direct appeal to the Supreme Court survive today.⁶⁶

Third, standards of review are not considered in this Article. The various phrases for defining the relevant scope of appellate review of a given issue prescribe: (1) the degree of deference owed to the court being reviewed; (2) the affirmative power of the reviewing court; (3) the relevant materials

at § 3908 (1976 & Supp. 1989) (collecting cases on finality—Supreme Court Review of state decisions compared to court of appeals review); 7B J. MOORE, M. WAXNER, H. FINK, D. EPSTEIN & G. GROTHEER, *MOORE'S FEDERAL PRACTICE* §§ 1257, 1291 (2d ed. 1989) [hereinafter 7B MOORE'S FEDERAL PRACTICE].

57. FED. R. CIV. P. 50(b).

58. FED. R. CIV. P. 52(b).

59. FED. R. CIV. P. 59(a).

60. FED. R. CIV. P. 59(e).

61. FED. R. CIV. P. 60(a).

62. FED. R. CIV. P. 60(b).

63. FED. R. CIV. P. 62.

64. For full discussion of Supreme Court's appellate jurisdiction, see e.g., R. STERN, E. GRESSMAN & S. SHAPIRO, *SUPREME COURT PRACTICE* (6th ed. 1986); E. CHERMERINSKY, *supra* note 23, ch. 10, at 491.

65. Pub. L. No. 100-352, 102 Stat. 662 (1988). See generally Boskey & Gressman, *The Supreme Court Bids Farewell To Mandatory Appeals*, 121 F.R.D. 81 (1988).

66. 28 U.S.C. § 1253 (1982).

Section 1253 provides:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges.

See generally 17 *FEDERAL PRACTICE & PROCEDURE*, *supra* note 41, at § 4040 (2d ed. 1988); 7B MOORE'S FEDERAL PRACTICE, *supra* note 56, at § 1253 (construes line of cases limiting direct appeal to Supreme Court under section 1253).

appropriate for consideration; (4) the level of scrutiny on review; and, (5) the framework of analysis for questions of fact and law.⁶⁷ A thoughtful elaboration on these functions would require a separate article, if not a separate treatise.⁶⁸ A standard of review establishes the analytical process for deciding an issue on an appeal for which the appellate court has concluded it has jurisdiction. Although the two concepts are related, this Article is limited to the process by which this second conclusion is reached.

Fourth, this Article cannot summarize all the complexities of federal appellate procedure. Full length books have been given over to the art of appellate advocacy.⁶⁹ The Federal Rules of Appellate Procedure create a national framework for appellate procedure which has been embellished by each circuit through the promulgation of Local Rules and Internal Operating Procedures. Deemed relevant here are only those appellate procedures that determine directly the power to decide an appeal.

Fifth and finally, this Article focuses only on the decisionmaking responsibility of the courts of appeals to review cases. Matters of judicial administration, although quite important, are left to the Judicial Council in each circuit and to the Judicial Conference of the United States.⁷⁰ Thus, such matters as the promulgation of the rules of procedure⁷¹ and the procedures for judicial disability or misconduct⁷² are beyond this treatment.

II. PROCEDURES RELATED TO THE EXERCISE OF SUBJECT MATTER JURISDICTION

A. *Derivative Jurisdiction*

As previously noted, because they are federal courts, the courts of appeals are courts of limited jurisdiction.⁷³ While a lack of personal jurisdiction may

67. See generally S. CHILDRESS & M. DAVIS, STANDARDS OF REVIEW: VOL. 1 FEDERAL CIVIL CASES AND REVIEW PROCESS & VOL. 2 FEDERAL CRIMINAL CASES AND ADMINISTRATIVE APPEALS (1986).

68. *Id.*

69. E.g., R. MARTINEAU, MODERN APPELLATE PRACTICE—FEDERAL AND STATE CIVIL APPEALS (1983); M. TIGAR, FEDERAL APPEALS—JURISDICTION AND PRACTICE (1987); F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS (2d ed. 1961).

70. See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3939 (1977) (explaining Judicial Councils established by 28 U.S.C. § 332).

71. FED. R. APP. P. 47 (rules by courts of appeals); 28 U.S.C. § 2071 (1982), *as amended* by Act of Nov. 19, 1988, Pub. L. No. 100-702, 102 Stat. 4650 (1988) (provides rule-making power generally).

72. 28 U.S.C. § 372 (1982) (procedures for judicial disability or misconduct).

73. See *supra* note 41 and accompanying text. See also *Point Landing, Inc., v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 423 (5th Cir.) (federal courts may exercise only so much of their article III jurisdiction as granted by Congress, therefore statutory authorization is necessary to a federal court's service of summons), *aff'd*, 484 U.S. 97 (1987); *Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 350 (3d Cir. 1986) (all related doctrines of justiciability rely on concern that exercise of judicial authority must be properly limited in a democratic society, *citing, e.g.*,

be a defect cured by acquiescence (actual, assumed or imposed), the same is not true for subject matter jurisdiction.⁷⁴ The subject matter jurisdiction of the federal courts of appeals derives chiefly from the subject matter jurisdiction of the district courts or other tribunals whose decisions are being reviewed.⁷⁵ Therefore, in order for a court of appeals to have jurisdiction over any given appeal, at the proper time and in the proper manner, the district court must have originally had subject matter jurisdiction over the original matter.⁷⁶

This Article cannot elaborate on the complexity of the various methods by which a district court may obtain original subject matter jurisdiction such as diversity,⁷⁷ general federal question,⁷⁸ and special federal question.⁷⁹ These provisions are complicated even more by the accumulated judicial gloss of

Allen v. Wright, 468 U.S. 737, 750 (1984); Warth v. Seldin, 422 U.S. 490 (1975)); Dracos v. Hellenic Lines Ltd., 762 F.2d 348, 350 (4th Cir.) (federal courts are courts of limited jurisdiction—their jurisdiction will not be presumed), *cert. denied*, 474 U.S. 945 (1985); Giannakos v. M/V Bravo Trader, 762 F.2d 1295 (5th Cir. 1985) (inferior federal courts have limited jurisdiction . . . dispute must fall within confines of jurisdiction conferred by Constitution and Congress, otherwise courts have no authority to resolve). *See generally* 13 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3522.

74. Compare FED. R. Civ. P. 12(h)(1) (defense of lack of jurisdiction over the person is waived in certain circumstances) with FED. R. Civ. P. 12(h)(3) (*whenever* it appears that the court lacks jurisdiction of subject matter, the court shall *dismiss*) (emphasis added to show that parties may waive personal jurisdictional requirements, but not subject matter jurisdictional requirements). *See, e.g.,* Giannkos, 762 F.2d at 1297 (question of subject matter jurisdiction can never be waived, and, if not raised by parties, United States district courts and courts of appeals have responsibility to consider the question *sua sponte* and dismiss if such jurisdiction is lacking), *citing In re Kutner*, 656 F.2d 1107, 1110 (5th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982).

75. *See* Hefley v. Texion, Inc., 713 F.2d 1487, 1495 (10th Cir. 1983) (courts of appeals do not have power to enlarge jurisdiction of federal district courts by judicial interpretation), *citing* American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17 (1951).

76. "The concept of derivative jurisdiction of course does not mean that a court of appeals lacks authority to review the question whether the district court had jurisdiction. Similarly, the argument that the district court lacked personal jurisdiction is no basis for defeating the jurisdiction of the court of appeals to review all jurisdictional questions." 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3901 (Supp. 1989), *citing* Flood v. Braaten, 727 F.2d 303, 306 n.12 (3d Cir. 1984). *Cf. A.L. Rowan & Son, Gen. Contractors, Inc. v. Department of Housing & Urban Dev.*, 611 F.2d 997 (5th Cir. 1980) (recognizing general formula that appellate court jurisdiction derives from jurisdiction of district court, but concluded that in case of two claims, where one was within the subject matter jurisdiction of district court and one within exclusive jurisdiction of court of claims, appellate court could exercise on its own the district court's power of transfer to direct transfer of entire action to court of claims). *See also* Foster v. Center Township, 798 F.2d 237, 241 (7th Cir. 1986) (if lower court lacked jurisdiction because plaintiff lacked standing to sue, then appellate court has jurisdiction on appeal, not of merits but to correct lower court's error).

77. 28 U.S.C. § 1332 (1982).

78. 28 U.S.C. § 1331 (1982).

79. *E.g.,* 28 U.S.C. §§ 1333 (admiralty), 1337 (commerce), 1338 (patents), 1339 (postal) & 1352 (bonds) (1982).

such doctrines as the rules for calculating the amount in controversy,⁸⁰ the well-pleaded complaint rule,⁸¹ and abstention⁸² to mention just a few. While an attempt even to list, let alone summarize, herein all of the principles of subject matter jurisdiction would be an undisciplined digression, it is enough to emphasize the important point that appellate subject matter jurisdiction derives from the original jurisdiction of the district court and must continue to exist independently on appeal. Thus, all the concepts concerning original subject matter jurisdiction remain relevant on appeal.

A related distinction must always be made between a lack of jurisdiction and a lack of merit. On appeal, as with original jurisdiction, the power of the court to decide the case depends both on the subject matter of the action and the status of the parties. It is axiomatic that there is jurisdiction to decide a case on appeal despite the fact that there is no merit to the appeal or even if there was no merit to the original complaint.⁸³

80. See, e.g., *Saint Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) (amount claimed by plaintiff controls if claim is apparently made in good faith—must appear to a legal certainty that the claim is really for less to justify dismissal).

81. *Louisville & N. R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (plaintiff must raise federal question in the complaint; to anticipate a federal question defense does not satisfy federal question jurisdictional requirement).

82. See M. REDISH, *TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* ch. 9 (1980) (discussing the various abstention doctrines).

83. *Bell v. Hood*, 327 U.S. 678, 682 (1946) (subject matter jurisdiction not defeated merely because a party fails to state a cause of action, rather, "failure to state a proper cause of action calls for a judgment of the merits and not for a dismissal for want of jurisdiction.'). See also *Williamson v. Tucker*, 645 F.2d 404 (5th Cir.) (explaining *Bell*), cert. denied, 454 U.S. 897 (1981). In *Williamson*, the court noted that, in the interest of judicial economy, where a defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case. *Id.* at 415. Exceptions to this rule occur where the alleged claim under the Constitution or federal statutes "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* (citing *Bell*, 327 U.S. at 682). See, e.g., *Goldman v. Gallant Securities, Inc.*, 878 F.2d 71, 73 (2d Cir. 1989) (appellant alleged violations of federal and state law; because district court could not say either that plaintiff made federal claims solely for purpose of obtaining jurisdiction or that claims were so insubstantial as not to deserve at least preliminary review on merits, court improperly dismissed for lack of subject matter jurisdiction); *Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 840 F.2d 236, 239 (4th Cir. 1988) (Powell, J., sitting by designation) ("If the complaint alleges a violation of federal law and the claim is 'neither immaterial nor insubstantial, the proper course of action is for the district court to accept jurisdiction and address [an] objection as an attack on the merits'" (citing *Bell*, 327 U.S. at 682)); *Daniel v. Ferguson*, 839 F.2d 1124, 1127 (5th Cir. 1988) (district court dismissed for lack of subject matter jurisdiction; appellate court reversed in part because should have found jurisdiction existed then directly attacked merits of plaintiff's case); *Chiplin Enter., Inc. v. City of Lebanon*, 712 F.2d 1524, 1529 (1st Cir. 1983) (court affirmed dismissal, but noted that plaintiff's failure to state federal claim should have been grounds for dismissal rather than jurisdictional grounds); *Inland Oil & Transp. Co. v. Adams*, 575 F.2d 184, 190 (8th Cir. 1978) (distinction exists between absence of subject matter jurisdiction and failure to state a claim, however, often this distinction is not

The additional jurisdictional requirement which accompanies an appeal is the notion of finality or some reason to excuse finality for interlocutory review.⁸⁴ This notion is best understood as the structure of the relationship between the reviewing court and the court being reviewed. The reviewing court always should consider its own jurisdiction as a condition precedent to any further action on appeal. That, of course, is the subject of the remainder of this Article.

B. Scope of Review

Once jurisdiction attaches, the appellate power is plenary. By statute, the court of appeals is vested with the power to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause, . . . or require such further proceedings to be had as may be just under the circumstances."⁸⁵ Thus it

important from practical standpoint because district courts often hold that a case lacks subject matter jurisdiction when they mean the complaint failed to state a claim); *Mahone v. Waddle*, 564 F.2d 1018, 1022 (3d Cir. 1977) (explaining *Bell v. Hood*, in that a federal district court has subject matter jurisdiction over a case whenever pleadings allege matters in controversy arising under the Constitution or laws of the United States, and that question of jurisdiction is analytically distinct from question of whether party has stated a cause of action), *cert. denied*, 438 U.S. 904 (1978); *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967) (court dismissed for failure to state a claim but should have dismissed for lack of subject matter jurisdiction so plaintiff could seek relief in state courts). See generally 13 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, § 3522, at 79 n.29; 5 FEDERAL PRACTICE AND PROCEDURE, *supra* note 41, at § 1350 (Supp. 1989), citing *Lewis v. Knutson*, 699 F.2d 230, 237 (5th Cir. 1983) ("if the facial attack defeats jurisdiction, the case should be dismissed under Rule 12(b)(1) . . . [but] if the case survives the facial jurisdictional attack, a failure of the existence of the cause of action should be disposed by a Rule 12(b)(6) dismissal on the merits"). The *Lewis* court explained, conversely, that if the jurisdictional challenge does not implicate the merits of the cause of action, the jurisdictional basis must survive both facial and factual attacks before the district court can address the merits of the claim. *Id.* at 237, citing *Williamson*, 645 F.2d at 412-15 & n.9.

84. See 28 U.S.C. § 1291 ("the courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions . . . of the district courts of the United States, the United States District Court for the District of the Canal"); M. TIGAR, *supra* note 69, at §§ 2.02, 2.03 & 2.04 (discussing issue of *what* constitutes a final judgment for purposes of appeal, civil and criminal appeals, and exceptions to the finality requirement). See also 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 110.02 (2d ed. 1989) [hereinafter 9 MOORE'S FEDERAL PRACTICE] (discussing 28 U.S.C. § 1291). For an additional discussion of finality, see *infra* Part III.

85. 28 U.S.C. § 2106 (1982). See, e.g., *United States v. White*, 855 F.2d 201 (5th Cir. 1988) (circuit courts exercise supervisory power over all district courts in the circuit), *cert. denied*, 109 S. Ct. 3172 (1989); *Thomas v. Arn*, 474 U.S. 140, 147 (1985) ("It cannot be doubted that the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation."), citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (approved circuit court's exercise of supervisory powers to require district court inquiry concerning joint representation of criminal defendants). The *Arn* Court, in a footnote, explained that the supervisory power rests on firmest ground when used to establish rules of judicial procedure. 474 U.S. at 147 n.5 (citing Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of The Federal Courts*,

has been suggested, although somewhat facetiously, that a circuit judge with a concurring second vote can "do justice" within constitutional and statutory limits. A few general and particular limits, beyond those of precedent and the judicial hierarchy, should nonetheless be mentioned briefly.

Generally, Congress has narrowed the scope of appellate review in both civil and criminal matters, to remove from consideration "errors or defects which do not affect the substantial rights of the parties."⁸⁶ This concept of "harmless error" varies with the character of the issue being raised; different analyses apply whether the error was preserved by an objection, whether the matter is civil or criminal, and whether the issue is of constitutional proportion.⁸⁷

A second general, although rarely mentioned, statute provides that there shall be no reversal in the courts of appeals "for error in ruling upon matters in abatement which do not involve jurisdiction."⁸⁸ The reach of this provision may be described, with some finesse, as including nonjurisdictional motions which, if granted, would result in the dismissal of an action without prejudice to its reconsideration when refiled by another pleading or in another forum.⁸⁹

84 COLUM. L. REV. 1433, 1465 (1984) (federal courts have inherent authority to regulate "technical details and policies intrinsic to the litigation process"). See generally 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3901 (1976 & Supp. 1989) (discussing supervisory powers).

86. 28 U.S.C. § 2111 (1982). See generally *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54 (1984) (doctrine of harmless error embodies "the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial"; noting also that FED. R. CIV. P. 61 technically applies only to district courts, but that circuit courts should act in accordance with the policy of Rule 61). See FED. R. CIV. P. 61 (no error is grounds for reversal, new trial, modifying, etc., unless refusal to take such action appears to court inconsistent with substantial justice); FED. R. EVID. 103(a) ("Effect of erroneous ruling—error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected").

87. See generally S. CHILDRESS & M. DAVIS, *supra* note 67, at §§ 1.07, 6.5; 11 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at §§ 2881-2883 (1973) (doctrine of "plain error" applies in most civil or criminal cases, however, in criminal cases some constitutional errors can never be treated as harmless and other constitutional errors are harmless only if "beyond a reasonable doubt", citing *Chapman v. California*, 386 U.S. 18, 23-24, 28 (1967); 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 61.11 (1987) [hereinafter 7 MOORE'S FEDERAL PRACTICE] (discussing application of harmless error rule to circuit courts).

88. 28 U.S.C. § 2105 (1982).

89. See generally 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3903 (1976) (section 2105 is one of "most commonly ignored provisions of the Judicial Code . . . its most important feature is certainly its disuse."); 7 MOORE'S FEDERAL PRACTICE, *supra* note 87, at ¶ 61.11 (citing e.g., *Chasser v. Achille Lauro Lines S.R.L.*, 844 F.2d 50, 53 (2d Cir. 1988) (statute did not make refusal to enforce forum-selection clause unreviewable after final judgment and would not allow refusal to enforce clause to be reviewed at earlier state; statute not to be taken literally), *aff'd*, 109 S. Ct. 1976 (1989)); *Hayes v. Allstate Ins. Co.*, 722 F.2d 1332, 1332 n.1 (7th Cir. 1983) (district court order granting motion to stay proceedings and ordering parties to proceed to an appraisal ruled on the merits of insured's action on the contract and thus was appealable; order was not merely one of abatement).

There are a few particular limits on the jurisdiction of the courts of appeals to be found in Title 28. An order of a district court remanding a case previously removed to it from a state court "is not reviewable on appeal or otherwise."⁹⁰ Likewise, there is a prohibition on appeals from final orders in proceedings in the nature of habeas corpus brought to test the validity of a warrant to remove a person charged with a federal crime to a different district or place of confinement.⁹¹

Although the courts of appeals are courts of limited jurisdiction and subject to these and other various statutory limitations, the plenary power to decide a proper appeal has a dimension of inherent authority. There is a vague notion of pendent or ancillary appellate jurisdiction exhibited whenever the reviewing court contemplates the scope of its own reviewing authority to go beyond the questions presented on appeal. The basic notion underlying traditional pendent or ancillary jurisdiction is that if a federal court *qua* court has some jurisdiction in a particular matter, it then has the power to decide the entire case or controversy, including aspects of the matter over which there is no independent jurisdictional basis. This is a rather curious notion when juxtaposed with the notion of a limited federal jurisdiction, but is understandable as an inherent power with which the federal court *qua* court is possessed. While the exercise of pendent or ancillary jurisdiction is more commonplace at the district court level, it is also part of the federal appellate jurisdiction.⁹² For example, some applications involve the courts

90. 28 U.S.C. § 1447(d) (1982). There is an exception to this limitation for civil rights cases removed under 28 U.S.C. § 1443 (1982).

Section 1447(d) provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to § 1443 of this title shall be reviewable by appeal or otherwise." *See, e.g.,* Baucom v. Pilot Life Ins. Co., 674 F. Supp. 1175 (M.D.N.C. 1987) (removal statute strictly construed against removal, with all doubts resolved in favor of remand); Schwinn Bicycle Co. v. Brown, 535 F. Supp. 486 (D.C. Ark. 1982) (removal statute strictly construed in favor of state court jurisdiction).

Section 1443 provides:

Any of the following civil actions or criminal prosecutions, commenced in a state court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending: . . .

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 U.S.C. § 1443 (1982).

91. 28 U.S.C. § 2253 (1982).

92. *See generally* 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3937 (1977) (court of appeals may decide questions beyond obvious limits authorized by appeal through "species of ancillary or pendent jurisdiction."). *But see* General Motors Corp. v. Gibson Chem. & Oil Corp., 786 F.2d 105, 108-09 (2d Cir. 1986) (court declined to invoke pendent jurisdiction because such jurisdiction is discretionary and usually better to avoid unless issues presented by

of appeals' determination of the proper scope of appeal from a final judgment. More frequently, however, these concepts are applied to broaden the scope of an interlocutory appeal so as to allow consideration of matters beyond the particular order on review. This makes sense since the disruption, delay, and expense of an appeal prior to final judgment have already occurred.⁹³ At any rate, these exercises of the power of "pendent review" are still developing and the answers to the jurisdictional questions raised are not yet certain.⁹⁴

C. *Standing to Appeal*

In most appeals, whether the appellant has standing to prosecute the appeal is a straightforward question with an obvious answer.⁹⁵ Generally, a plaintiff who does not have standing to sue does not have standing to bring an appeal, although the rules and decisions on the former status are much more detailed than those on the latter. A simple rule of thumb is whether the judgment being challenged has an adverse impact on the individual appellant or, in the case of a cross-appeal, the issues raised might have an adverse effect upon a reversal on the main appeal. Deciding whether an impact is adverse may, at times, become somewhat metaphysical. In a recent leading opinion, the Supreme Court neatly summarized the operative rules:

Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it. . . . The rule is one of federal appellate practice, however, derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does not have its source in the jurisdictional limitations of Art. III. In an

appealable and nonappealable orders overlap); *Garner v. Wolfinbarger*, 433 F.2d 117, 120 (5th Cir. 1970) (refused to apply principle of pendent jurisdiction to interlocutory appeal, despite "temptation to consider everything on a sort of ad hoc pendent jurisdictional basis," because issue was one of appellate jurisdiction rather than convenience).

93. 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3937 (1977) (strong reasons to accept conclusion that court of appeals should at least have power to extend scope of review include fact that disruption, delay and expense that attend appeal of final judgment have already occurred).

94. *See, e.g., San Filippo v. U.S. Trust Co.*, 470 U.S. 1035, 1036 (1985) (White, J., dissenting) (although Second Circuit invoked doctrine of pendent jurisdiction to consider appeal of nonfinal orders under collateral order doctrine, Justice White disagreed, citing *Abney v. United States*, 451 U.S. 651 (1977) (court may exercise collateral order jurisdiction over appeal from pretrial order which denied motion to dismiss but such jurisdiction did not extend to "other claims . . . unless they too fall under *Cohen* collateral order doctrine"; the doctrine should be sparingly applied)); *Armstrong v. McAlpin*, 699 F.2d 79, 94 (2d Cir. 1983) (because appellate court reversed judgment and remanded for further proceedings, it dismissed cross appeal from disqualification order on ground that order no longer final).

95. *See generally* 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3902 (1976) (discussing special limits on jurisdiction—standing); 7 (Part 2) MOORE'S FEDERAL PRACTICE, *supra* note 46, at ¶ 65.17 (discussing standing to sue, justiciability and related matters).

appropriate case appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III.⁹⁶

Each of these principles, of course, has a certain iceberg quality.

The rule for a cross-appeal is somewhat related.⁹⁷ An appellee usually may argue for affirmance of the decision on a ground not decided by the district court without filing a cross-appeal. Generally, however, the appellee may not rely on the original appeal to obtain a modification of the judgment but must bring a cross-appeal. Although there are contrary authorities, this rule is best considered not to be a matter of jurisdiction and therefore may be ignored for good reason.

D. Courts Originating Appeals

Functionally and statistically, the district courts are the most significant source of appeals to the courts of appeals. In civil and criminal matters,⁹⁸ these include appeals from final judgments,⁹⁹ orders in the nature of final judgments,¹⁰⁰ interlocutory orders entitled¹⁰¹ or permitted¹⁰² to be appealed, and review by way of extraordinary writ.¹⁰³ About ten percent, more for the District of Columbia Circuit, of the appellate docket involves judicial review of final decisions and certain interim or interlocutory orders of dozens of

96. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980) (citing *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939)). See also *Karcher v. May*, 484 U.S. 72 (1987) (dismissed appeal for want of jurisdiction because parties who participated in lawsuit solely in their official capacity had left office before they appealed, therefore they did not have standing); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546-49 (1986) (respondent member of school board had no personal stake in outcome therefore had no standing to appeal in individual capacity); *In re First Colonial Corp.*, 693 F.2d 447, 449-50 (5th Cir. 1982) (party who successfully opposed motion to recuse judge below had no injury on this claim, thus had no standing to appeal); *Fisher v. Tucson School Dist. No. 1*, 625 F.2d 834 (9th Cir. 1980) (parents of school children who would not be involved in busing lacked standing to appeal busing order), cited in 15 *FEDERAL PRACTICE & PROCEDURE*, *supra* note 41, at § 3902 (Supp. 1989).

97. 15 *FEDERAL PRACTICE & PROCEDURE*, *supra* note 41, at § 3904 (1976 & Supp. 1989) (discussing special limits on jurisdiction—cross appeals). See *Schweiker v. Hogan*, 457 U.S. 569 (1982) (appellees may use statutory argument not presented to district court in support of judgment on cross appeal); *Bullard v. Sercon Corp.*, 846 F.2d 463, 467-68 (7th Cir. 1988) (appellee who won on merits need not file cross appeal to argue court should have dismissed for lack of jurisdiction); *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 439 (7th Cir. 1987) ("Cross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary . . . they disrupt the briefing schedule and they make the case less readily understandable"), *cert. dismissed*, 108 S. Ct. 1067 (1988); 9 *MOORE'S FEDERAL PRACTICE*, *supra* note 84, at ¶ 204.11 (discussing time for taking cross or other separate appeals).

98. See *infra* Part VI.

99. See *infra* Part III(B).

100. See *infra* Parts III(B) & (C).

101. See *infra* Part IV(B).

102. See *infra* Part IV(C).

103. See *infra* Part V(C).

federal agencies, boards and offices.¹⁰⁴ In addition, the appropriate court of appeals has, by statute, exclusive jurisdiction to review decisions of the United States Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."¹⁰⁵

As amended in 1984, the bankruptcy statute creates a three-tiered review: from bankruptcy judge to district court or bankruptcy panel, then to a court of appeals.¹⁰⁶ Aside from orders that otherwise fit the general appellate criteria under 28 U.S.C. § 1291, the bankruptcy statute grants the courts of appeals jurisdiction to review all final decisions, judgments, and decrees entered by either a district court on appeal to such court from a bankruptcy judge or by a bankruptcy appellate panel established by order of a judicial council of the circuit to review bankruptcy court orders.¹⁰⁷

Several other sources of appeals need be mentioned. The Federal Magistrate Act of 1979¹⁰⁸ created two additional sources of jurisdiction for the courts of appeals: specified direct appeals from a magistrate, and discre-

104. 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3940 (1977) (providing statistics on number of administrative review proceedings from THE ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS). See *infra* Parts VII(A) & (B).

105. 26 U.S.C. § 7482(a) (1982) (courts of appeals jurisdictional provision). See generally M. GARBIS & A. SCHWARTZ, TAX COURT PRACTICE (1974); M. GARBIS & S. STRUNTZ, TAX PROCEDURE AND TAX FRAUD (1981). See also 17 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 4102 (2d ed. 1988) (confession of error by Internal Revenue Service does not destroy jurisdiction of Tax Court, citing *Bowman v. Commissioner*, 17 T.C. 681, 685 (1951)); *id.* at § 4102 (District of Columbia Court of Appeals has venue of a tax case if taxpayer residence provisions are inapplicable, citing 26 U.S.C. § 7482(b)(1)); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 213.03[1.-2.] (court of appeals has exclusive jurisdiction to review decisions of Tax Court).

106. 28 U.S.C. § 158 (1982), which reads in pertinent part:

§ 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

* * * * *

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders and decrees entered under subsections (a) and (b) of this section.

Id.

107. 28 U.S.C. § 158 (Supp. III 1985). The peculiar nature of the exclusive federal original jurisdiction skews the analysis of the appellate jurisdiction. See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3926 (1977) (bankruptcy appeals); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 110.23, 110.24 (orders appealable under Bankruptcy Act and procedure for seeking permission to appeal).

108. Pub. L. No. 96-82, 93 Stat. 643 (1979) (codified as 28 U.S.C. § 636 (1982)). See generally 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3901.1 (1976 & Supp. 1989) (magistrate appeals); 7B MOORE'S FEDERAL PRACTICE, *supra* note 56, at § 636.

tionary review after direct review in the district court. Furthermore, although they seldom do, individual judges of the courts of appeals are authorized to issue writs of habeas corpus and prisoners may so challenge their custody under state or federal judgments of confinement.¹⁰⁹ Finally, the United States Court of Appeals for the Federal Circuit was created in 1982 with national jurisdiction over a variety of subject matters.¹¹⁰ Included in the Federal Circuit's appellate jurisdiction are cases originating from the United States Claims Court, the Board of Patent Appeals, district courts in patent matters, the United States Court of International Trade, and other miscellaneous agencies and executive officers.¹¹¹

E. *The Locus of Appeals*

In most cases, the proper locus of appeal is obvious. The notice of appeal designates the court of appeals for the circuit geographically encompassing the district court in which the suit was filed.¹¹² There may be optional appellate venues in certain matters, such as in reviews of agency matters.¹¹³ Furthermore, appellate venue may be manipulated by the strategic choice among optional trial venues, for example, in tax cases,¹¹⁴ or by a motion for a general change of venue in civil matters.¹¹⁵ Again, the various provisions governing the Federal Circuit are so complex as to oblige only a disclaimer of incompleteness in this Article.¹¹⁶

109. FED. R. APP. P. 22(a); 28 U.S.C. § 2241 (1982) ("Power to grant writ").

110. 28 U.S.C. § 1295 (1982).

111. *Id.* See generally 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3903.1 (1976 & Supp. 1989) (discussing special courts of appeals).

112. 28 U.S.C. § 1294 (1982). Section 1294 provides:

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the district of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

See also 28 U.S.C. § 1407(b) (1982) (consolidation of multidistrict cases).

113. 28 U.S.C. § 2112 (1982). As of this writing, rules have been proposed for multicircuit petitions for review. PROPOSED RULES, JUDICIAL PANEL ON MULTIDISTRICT LITIGATION 840 F.2d No. 2 at ci-cxvii (Mar. 31, 1988). See *infra* Part VII(A).

114. See generally 17 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 4102 (2d ed. 1988) (discussing the tax court); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 213.01-.03[5] (discussing the history, creation, organization, jurisdiction and procedure of tax court).

115. 28 U.S.C. §§ 1404, 1406 (1982). See generally Annotation, *Mandamus, Prohibition or Interlocutory Appeal As Proper Remedy to Seek Review of District Court's Disposition of Motion for Change of Venue Under § 1404(a) or § 1406(a) of Judicial Code*, 2 A.L.R. FED. 573 (1969).

116. See *supra* notes 110-11 and accompanying text.

F. *The Notice of Appeal*

The requirements as to the form of the notice of appeal are simple and straightforward.¹¹⁷ Rule 3 of the Federal Rules of Appellate Procedure requires a notice to be filed with the clerk of the court that rendered the judgment which "shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken."¹¹⁸ Even such minimal content requirements are excused as long as the true intent of the appellant is ascertainable, the courts have not been misled, and there has been no prejudice to the other parties.¹¹⁹ The requirements for timeliness of the notice of appeal, by contrast, are of another magnitude of complexity and trigger draconian effects upon their breach.

Timeliness of the notice of appeal is jurisdictional. Determining the timeliness of a notice of appeal may have become as arcane as appellate jurisdiction can become. Separate rules apply for permissive interlocutory appeals,¹²⁰ agency review,¹²¹ bankruptcy and appeals,¹²² Tax Court review,¹²³ and habeas corpus cases.¹²⁴ Rule 4 of the Federal Rules of Appellate Pro-

117. See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3949 (1977) (appeals as of right—how taken); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 203.03-.05 (explaining FED. R. APP. P. 3).

118. FED. R. APP. P. 3(c). See also FED. R. APP. P. 12(a) (docketing the appeal). See generally M. TIGAR, *supra* note 69, at § 6.02 ("Notice of Appeal in Appeals of Right.").

119. See *Foman v. Davis*, 371 U.S. 178, 181 (1962) (court should have treated second notice of appeal, which failed to indicate the judgment appealed from, as "effective, although inept, attempt to appeal from the judgment sought to be vacated."). But cf. *Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405, 2408-09 (1988) (in spite of *Foman* principle that procedural requirements for notice of appeal be liberally construed, failure to comply with specificity requirement of Rule 3(c) was insufficient notice even under liberal construction because Rule 3(c) is a jurisdiction prerequisite).

120. 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3951 (1977) (discussing permissive appeals under section 1292(b)); 7B MOORE'S FEDERAL PRACTICE, *supra* note 56, at § 1292. For general analysis of the Interlocutory Appeals Act of 1958, see *id.* at § 110.24 for procedure for seeking interlocutory appeals); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 205.01-.07 (appeals by permission under 28 U.S.C. § 1292(b) and Rule 5).

121. 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at §§ 3961-3966 (1977) (discussing review and enforcement of orders of administrative agencies, boards, commissions and officers); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 215.01-220.02 (discussing rules regarding agency review).

122. 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3952 (1977) (discussing Rule 6, bankruptcy appeals by allowance); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 206.01-.07 (discussing bankruptcy and appeals).

123. 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at §§ 3959-3960 (1977) (discussing review of decisions of United States Tax Court); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 213.03-.03[5] (stay of collection pending appeal from a decision of the tax court), ¶ 214.02 (application of other rules to appeals from decisions of tax court).

124. 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at §§ 3968-3970 (1977) (discussing Rules 22, 23 and 24, "Habeas Corpus Proceedings; Custody of Prisoners in Habeas Corpus Proceedings and Proceedings in Forma Pauperis"); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 222.01-224.04 (discussing history of Rule 22, "Habeas Corpus Petitions to Judges of the Courts of Appeals; Necessity of Certificate of Probable Cause for Appeal").

cedure generally governs appeals as of right in civil and criminal matters.¹²⁵

In civil cases, Rule 4 requires a notice of appeal to be filed within thirty days after entry of judgment, unless the United States is a party in which case sixty days is allowed.¹²⁶ In criminal cases, the notice is due within ten days of entry of the judgment or order and within thirty days for government appeals.¹²⁷ Both periods may be extended thirty days on the ground of "excusable neglect."¹²⁸ Cross-appeals must be filed within fourteen days of the filing of the first notice.¹²⁹ The chief complication arising from these timetables has to do with the judgment-suspending effect of various motions in the district court. Several post-trial motions suspend the finality of the judgment and the time for filing the notice of appeal so that the time begins to run from the decision on the motion. The motions with this effect include: motion for judgment notwithstanding the verdict;¹³⁰ motion for new trial;¹³¹ motion to amend the findings;¹³² motion to alter or amend the judgment;¹³³ motion for new (criminal) trial;¹³⁴ and, motion for arrest of (criminal) judgment.¹³⁵ Thus, a premature notice of appeal, filed before the disposition of any of these motions, in the words of Rule 4, "shall have no effect." Since the notice must be timely, a premature filing of an appeal without a timely refiling will leave the court of appeals without jurisdiction.¹³⁶

125. See generally Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 GA. L. REV. 399 (1986) (discussing strict enforcement of Rule 4 timing requirements and Supreme Court's characterization of timing rules as "mandatory and jurisdictional"); 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3950 (1977) (discussing Rule 4, appeals as of right; when taken); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 204.01-.20 (comprehensive treatment of timing requirement).

126. FED. R. APP. P. 4(a)(1). Rule 4 provides:

(a) Appeals in Civil Cases —(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from . . .

Id. See also FED. R. APP. P. 26 (computing actual date for appeal and motion procedure for extending time to appeal).

127. FED. R. APP. P. 4(b) (appeals in criminal cases).

128. *Id.* ("Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.").

129. FED. R. APP. P. 4(a)(3).

130. FED. R. CIV. P. 50(b).

131. FED. R. CIV. P. 59.

132. FED. R. CIV. P. 52(b).

133. FED. R. CIV. P. 59(e).

134. FED. R. CRIM. P. 33.

135. FED. R. CRIM. P. 34.

136. See *Osterneck v. Ernst & Whinney*, 109 S. Ct. 987, 991-93 (1989) (postjudgment motion for discretionary prejudgment interest falls under Rule 59(e) therefore any notice of appeal filed while such motion was pending is ineffective under Rule 4(a)(4)); *Budinich v. Benton Dickinson and Co.*, 486 U.S. 196 (1988) (request for attorney's fees not generally part of merits

G. Transferring Appeals

If an appeal in a civil action or a petition for agency review is filed in the wrong court of appeals so that jurisdiction is lacking, the matter may be transferred to the court of appeals in which the appeal could have been brought at the time notice was incorrectly filed, provided such transfer is "in the interest of justice."¹³⁷ This often overlooked provision is invoked most frequently between the regional courts of appeals and the Court of Appeals for the Federal Circuit, although it is not limited to that usage.¹³⁸

of action and does not prevent finality of judgment, therefore court of appeals correctly held appeal untimely because not within 30 days of order, even though no ruling on attorney's fees); *Buchanan v. Stanships, Inc.*, 485 U.S. 265 (1988) (per curiam) (application for costs, incorrectly brought as a Rule 59(e) motion, actually was Rule 54(d) motion rather than motion to alter or amend judgment; thus did not render notice of appeal ineffective); *Acosta v. Louisiana Dep't Health & Human Resources*, 478 U.S. 251, 253 (1986) (per curiam) (notice of appeal, filed after district court denied motion to alter or amend judgment but before order was entered on docket, premature and failure to file new notice requires court to comply with plain language of Rule 4(a)(4) and to treat first notice as a nullity); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (respondent filed notice of appeal while motion to alter or amend judgment pending; Court held that after 1979 amendments to Rules of Appellate Procedure, premature notice is "as if no notice is filed at all and Court of Appeals lacks jurisdiction.")). See also 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3950 (1977 & Supp. 1982) (subsequent notice of appeal is also ineffective if filed while timely Rule 59 motion still pending); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 204.12 [1] (post-1979 effect of Rule 59 motion on previously filed notice of appeal—"the appeal simply self-destructs"), *cited in Griggs*, 459 U.S. at 61.

137. 28 U.S.C. § 1631 (1982).

138. See *United States v. Hohri*, 482 U.S. 64, 75-76 (1987) (remand with instructions to transfer, because mixed case which presented both a nontax Little Tucker Act claim and FTCA claim may be appealed only to Federal Circuit which has "exclusive jurisdiction over every appeal from a Tucker Act or non-tax Little Tucker Act claim."); *Christianson v. Colt Indus. Operating Corp.*, 108 S. Ct. 2166, 2176, 2178 (1985) (in jurisdictional dispute between Court of Appeals for Federal Circuit and Seventh Circuit, after the case transferred from one to the other, the Supreme Court held that the particular complaint did not constitute a case arising under the patent statutes, and therefore Federal Circuit had no jurisdiction and should not have decided the merits prior to transfer to the Seventh Circuit. The Court vacated the judgment of the Federal Circuit and remanded with instructions to transfer to the Seventh Circuit). See, e.g., *Ross v. Colorado Outward Bound School, Inc.*, 822 F.2d 1524 (10th Cir. 1987) (collecting cases where federal courts have invoked section 1631 in transfers between other federal courts); *Wilson v. Turnage*, 755 F.2d 967 (D.C. Cir. 1985), *transferred to* 791 F.2d 151 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 988 (1986); *Olveira v. United States*, 734 F.2d 760, 762 (11th Cir. 1984) (transfer from Eleventh Circuit to Federal Circuit). See generally Note, *Christianson v. Colt Industries Operating Corp.: The Seventh Circuit Shoots for Multiple Transfer of Cases*, 1988 UTAH L. REV. 455; 18 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 4478 (1981 & Supp. 1989) (transferee court should adhere to transferring court's pre-transfer rulings as law of case, much the same as one district judge treats rulings of a colleague), *citing* *Dynalectron Corp. v. United States*, 4 Cl. Ct. 424, 431, *aff'd without opinion*, 758 F.2d 665 (Fed. Cir. 1984). See also 1A (Part 2) J. MOORE, W. TAGGERT, A. VESTAL, J. WICKER & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 0.346[9]-[10] (1989) (transfer between federal courts; transfer of administrative review proceedings from one appellate court to another).

H. Miscellaneous Procedures

The experienced reader can appreciate firsthand how procedure informs substance, and how resolution of procedural questions can shape the consideration of an appeal and determine its outcome. This represents an important dimension of the courts of appeals' jurisdiction—the power to determine how to go about exercising the power to decide appeals.¹³⁹ Most relevant here are motion practice and procedures of mandate.

Motion practice is not monolithic—according to the Federal Rules of Appellate Procedure and Local Rules in each circuit, specified motions are decided by the clerk's office, by a single circuit judge, by a multi-judge administrative panel, or by a hearing panel. Internal procedures vary from circuit to circuit.¹⁴⁰ Lesser matters, such as perfunctory filing extensions, are best left to the routine of the clerk's office. While the appellate rule specifically prohibits a single judge from dismissing an appeal,¹⁴¹ the Committee Commentary to Rule 27 of the Federal Rules of Appellate Procedure lists dozens of matters which are placed within the jurisdiction of a single circuit judge, either by rule or statute. These matters include entering a stay, issuing a certificate of probable cause, permitting intervention, appointing counsel, *et cetera*.

Other motions are expressly placed beyond the jurisdiction of a single judge, such as requests for permission to appeal,¹⁴² requests for extraordinary relief,¹⁴³ and petitions for rehearing.¹⁴⁴ The most common appellate motions include: motion to voluntarily withdraw and dismiss the appeal;¹⁴⁵ motion for stay or injunction pending review;¹⁴⁶ motion to expedite the appeal;¹⁴⁷ and, a motion for leave to file an *amicus curiae* brief.¹⁴⁸

A mandate is simply the order issued by the court of appeals, after decision of the appeal, directing some action be taken or some disposition be made of the matter in the court being reviewed. A mandate is composed of a certified copy of the judgment or order of the court of appeals, along with

139. See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at §§ 3971-3994 (1977) (discussing rules that govern procedural aspects of appeals, such as rules for filing and service, computation and extension of time, motions, briefs, appendices to briefs, filing and service of briefs, form of briefs); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 225.01-247.02 (discussing procedure of appeals).

140. See FED. R. APP. P. 27 (general motion procedures and power of single judge to entertain motions).

141. FED. R. APP. P. 27(c) (power of single judge to entertain motions).

142. FED. R. APP. P. 5, 5.1, 6 (appeals by permission under 28 U.S.C. § 1292(b), 28 U.S.C. § 636(c)(5), and in bankruptcy proceedings).

143. FED. R. APP. P. 21 (writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs).

144. FED. R. APP. P. 40 (petition for rehearing).

145. FED. R. APP. P. 42(b) (voluntary dismissal).

146. FED. R. APP. P. 8, 18 (stay or injunction pending appeal and stay pending review).

147. FED. R. APP. P. 31(a) (time for serving and filing briefs).

148. FED. R. APP. P. 29 (brief of an *amicus curiae*).

the written opinion, if any, and any court order regarding appellate costs.¹⁴⁹ Until it issues, all jurisdiction is retained by the appellate court and, once issued, the mandate binds the reviewed court or agency. The issuance of the mandate is stayed by the filing of a petition for rehearing¹⁵⁰ or a petition for a writ of certiorari in the Supreme Court.¹⁵¹ A timely petition for rehearing to the panel automatically stays the issuance of the mandate,¹⁵² while a suggestion for *en banc* rehearing, if granted, typically has the effect of vacating the panel opinion and judgment and staying the mandate.¹⁵³ In addition, there is a kind of inherent power in a court of appeals to recall a mandate, on rare and uncertain occasions, to prevent some manifest injustice.¹⁵⁴

III. APPEALS FROM FINAL DECISIONS—CIVIL

A. Generally

The principal grant of jurisdiction to the courts of appeals confers the power to review "all final decisions of the district court."¹⁵⁵ Therefore, unless it fits into one of the relatively narrow statutes authorizing interlocutory appeals,¹⁵⁶ the power to review a judgment or order depends on this characteristic of "finality."

The history of this requirement is long, if not illuminating. Finality has been a statutory requirement for as long as there have been federal appellate courts.¹⁵⁷ Courts have consistently deemed the requirement of a final decision to be jurisdictional.¹⁵⁸ Functionally, the requirement structures the relation-

149. FED. R. APP. P. 41 (issuance of mandate; stay of mandate).

150. FED. R. APP. P. 35(c), 40 (suggestion of a party for rehearing or rehearing *en banc*).

151. SUP. CT. R. 23.2 (found in 110 S. Ct. No. 4, at CIII) ("A petitioner entitled thereto may present to a Justice of this Court an application to stay the enforcement of the judgment sought to be reviewed on writ of certiorari. 28 U.S.C. § 2101(f).").

152. FED. R. APP. P. 41(a) ("The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court.").

153. *E.g.*, 5TH CIR. R. 41.3. "Effect of Granting Rehearing *en Banc*. Unless otherwise expressly provided, the effect of granting a rehearing *en banc* is to vacate the panel opinion and judgment of the court and to stay the mandate." (emphasis added).

154. 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3987 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 241.02[4] (no specific provision in Rules of Appellate Procedure for recall of the mandate).

155. 28 U.S.C. § 1291 (1982). *See also* 28 U.S.C. § 1295 (1982) (grant of jurisdiction to Court of Appeals for the Federal Circuit).

156. *See infra* Parts IV(A)-(C) & V(A)-(C).

157. Act of September 24, 1789, ch. 20, §§ 21, 22, 25, 1 Stat. 73. *See generally* 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3906 (1976 & Supp. 1989) (providing history of finality requirement); 6 J. MOORE, W. TAGGERT & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 54.04[2] (1988) [hereinafter 6 MOORE'S FEDERAL PRACTICE] (discussing the final judgment rule).

158. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). In *Firestone*, the Supreme Court held that a district court's pretrial order, which denied a motion to disqualify counsel, was not appealable under section 1291 prior to final judgment in the underlying

ship between appellate court and trial court; within this relationship, each court performs its complementary role.¹⁵⁹ Continuing past a ruling which is reversible error, in order to complete the trial and then to require an appeal and retrial, expends scarce judicial resources, arguably unnecessarily. The postponement of review imposed by the final decision rule is justified implicitly by an assumption that an even greater inefficiency, or waste of resources, would result if each and every ruling that might be reversed on appeal was immediately and separately appealable. The function of the trial court is to find facts and apply general principles of law.¹⁶⁰ To perform this function requires a range of discretion over trial procedures.¹⁶¹ Most trial rulings therefore do not result in reversal, and most often factfinding is a necessary precedent to deciding legal questions.¹⁶² The final decision requirement thus preserves the integrity of the trial court function. The value of self-correction is also preserved, by postponing review at least until the trial judge has had an opportunity to rule finally and fully on the matter.

Frequently, interlocutory trial court rulings are reconsidered. Most significant is the assumption of efficiency. Postponing review of a ruling may deemphasize the issue, for example, if the parties settle or the trial outcome turns out not to depend on the ruling, or if there is simply no appeal. Repeated interlocutory appeals would only impede and prolong the trial and could exacerbate any inequality of resources between the adversaries. Pragmatically considered, the policy of the final decision requirement recognizes that most appeals after final judgment—four out of five—are affirmed and, presumably, so would most interlocutory appeals.

All of this is not to say that there is no “downside” to the finality policy. Indeed, countervailing concerns have resulted in qualifications of the finality

litigation. Since the finality requirement is jurisdictional, the Court held that the Eighth Circuit erred when it went on to decide the merits of this case, because the court had no jurisdiction to hear the appeal of a non-final order. The Court reasoned that, if there is no jurisdiction to hear the appeal, then there is no jurisdiction to decide the merits. *Id. Accord* Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 440-41 (1985) (“orders disqualifying counsel in civil cases, like orders disqualifying counsel in criminal cases and orders denying a motion to disqualify in civil cases, are not collateral orders subject to appeal as ‘final judgments’ within the meaning of 28 U.S.C. § 1291.”).

159. See generally 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3907 (1976) (discussing purposes of finality); 9 MOORE’S FEDERAL PRACTICE, *supra* note 84, at ¶ 110.07 (same).

160. *E.g.*, Missouri Pac. Joint Protective Bd. v. Missouri Pac. R.R., 730 F.2d 533, 537 (8th Cir. 1984), *citing* 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3907 (1976) (findings of fact and application of generalized legal standards are the primary responsibility of the trial courts).

161. See *Partrederiet Treasure Saga v. Joy Mfg. Co.*, 804 F.2d 308, 310 (5th Cir. 1986) (denial of motion to dismiss on forum non conveniens grounds is not appealable, because “[n]on-appealability . . . recognizes the wide discretion permitted trial courts in procedural matters”).

162. *E.g.*, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 434-35 (1985), *citing* 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3907 (Supp. 1989) (most pretrial orders of district judges are ultimately affirmed by appellate courts).

requirement by statute, by rule, and by judicial decision.¹⁶³ Some rulings, a preliminary injunction for example, may work an independent and irreparable harm during trial and may so profoundly affect the trial that the appeal-reversal-retrial routine would be too little too late.¹⁶⁴ Furthermore, the liberal joinder rules in modern complex litigation give rise to rulings which affect severable parties or claims and which do not influence the remainder in a way that would manifest the evils of piecemeal review.¹⁶⁵ Finality is, after all, in the eyes of the beholder, and appellate judges should and do have an eye for justice.¹⁶⁶

This is not meant to characterize the policy of finality as so self-contradictory as to pose an insoluble dilemma. Nor are the rules of finality being criticized as being unduly complex and uncertain or so malleable as to be formless. What should be expected, rather, and what characterizes the principles of appellate jurisdiction found in the statutes, rules, and court decisions, is a kind of categorical balancing of the competing values, a balance that in some circumstances favors awaiting a final judgment and that in other circumstances favors allowing an interlocutory appeal.

B. *The Final Decision Requirement*

Section 1291 of Title 28, grants to the courts of appeals appellate jurisdiction to review "all final decisions," although that phrase is nowhere defined in the United States Code.¹⁶⁷ Judicial interpretation provides a study in contrast. At one extreme, since the statute does not refer to "judgments," it might be read to permit an appeal from every ruling or order—every "decision"—of the district court. At the other extreme, the phrase might be read to emphasize "final" and thus to require that the litigation in the district court be literally and wholly complete. Courts have rejected both extremes.¹⁶⁸ The first extreme would allow too many appeals and would totally frustrate the policy of finality. The second extreme would be too strict and would ignore the occasional need for immediate review of orders with serious and direct consequences both in terms of unnecessary trial proceedings and in terms of irreparable injury to rights that could not be restored effectively by a later appeal. The resulting holdings on finality are purposeful and pragmatic.

Lawyers, and lawyers who become judges, are prone to look for "good language" in opinions to use. From their frequent quotation and citation,

163. See *infra* Part IV(B).

164. See *infra* Part III(E).

165. See *infra* Parts III(C) & (D).

166. See *infra* Part III(B).

167. 28 U.S.C. § 1291 (1982).

168. See generally 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3909 (1976) (collecting leading finality decisions); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 110.08-.08[3] (discussing general principles of finality).

what follows are several numbered examples of some of the "best language" on the final decision statute.

- (1) A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.¹⁶⁹

This language is often cited, but does not say much.¹⁷⁰

- Finality as a condition of review . . . has been departed from only when observance of it would practically defeat the right to any review at all.¹⁷¹

This language is much-cited in denying review.

- (3) But even so circumscribed a legal concept as appealable finality has a penumbral area. . . . [A] judgment directing immediate delivery of physical property is reviewable and is to be deemed dissociated from a provision for an accounting even though that is decreed in the same order. In effect, such a controversy is a multiple litigation allowing review of the adjudi-

169. *Catlin v. United States*, 324 U.S. 229, 233 (1945) (order denying motion by property owners to vacate a "judgment" vesting title to condemned property in the Government which was already in possession was not final and reviewable; the order left the question of compensation undecided and an appeal would be improper piecemeal review). See also *Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1069 (7th Cir. 1981) (quoting *Catlin*, 324 U.S. at 233, as the "normal" standard of finality); *EEOC v. American Express Co.*, 558 F.2d 102, 103 (2d Cir. 1977) (court dismissed appeal on ground that order declining to dismiss a complaint is not final order); *John Thompson Beacon Windows, Ltd. v. Ferro, Inc.*, 232 F.2d 366, 368 (D.C. Cir. 1956) (appeal dismissed for lack of jurisdiction on the grounds that an order overruling motion to compel arbitration was not a final order since it did not dispose of the whole case on the merits). But see *Thompson McKinnon Securities, Inc. v. Salter*, 873 F.2d 1397 (11th Cir. 1989) (under 28 U.S.C. § 15(a)(1), interlocutory orders refusing to compel arbitration are appealable—even though they are not final within the meaning of 28 U.S.C. § 1291).

170. For example, courts often use this language as an introduction to their analysis of finality, but the language itself answers few questions. Instead, the typical analysis expands on the *Catlin* introduction. See, e.g., *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717, 1720 (1988). In *Budinich*, the Court cited the *Catlin* language at the beginning of its analysis. The Court considered the question of whether a lower court's decision on the merits is a final decision when "the recoverability or amount of attorney's fees for the litigation remains to be determined." *Id.* The *Catlin* language was a mere starting point to the Court's conclusion that the unresolved issue of attorney's fees does not prevent finality of the judgment on the merits, in the interest of a uniform rule. *Id.* at 1721-22.

171. *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940) (holding order denying motion to quash made by persons served with subpoenas duces tecum for appearance and production of documents before a grand jury was not final and reviewable; witnesses could test subpoenas by disobedience and appeal from a final contempt adjudication). See *Flanagan v. United States*, 465 U.S. 259, 263, 265 (1984). In *Flanagan*, the district court's pretrial disqualification of defense counsel in criminal prosecution was not final and immediately appealable, thus the court of appeals had no jurisdiction to review the order prior to the entry of final judgment in the case. *Id.* (citing *Cobbledick*, 309 U.S. at 324-25). The court explained that to qualify as an exception to the finality rule, the trial court order must meet three conditions. *Id.* at 265. First, the order must conclusively determine the disputed question; second, the order must resolve an important issue completely separate from the merits of the action; third, the order must "be effectively unreviewable on appeal from a final judgment." *Id.* (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

cation which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled.¹⁷²

This language is much-cited in allowing review.

(4) [T]he requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. . . . On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate, the decree is regarded as concluding the case and is immediately reviewable There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing.¹⁷³

This language, from a five-four holding, demonstrates the difficulty in close cases.

(5) [The] struggle of the courts [requires] . . . sometimes choosing one and sometimes another of the considerations that always compete in the question of appealability, the most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.¹⁷⁴

172. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124-26 (1945) (holding state supreme court judgment ordering immediate delivery of physical possession of a radio station and a continuation of the proceedings for an accounting was final and reviewable). See *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101 n.4 (3d Cir. 1981) (applying the "pragmatic approach" of *Radio Station WOW*, to find that a district court order which reversed the final decision of the bankruptcy court was final and appealable for purposes of section 1293(b), notwithstanding remand to the bankruptcy court for an accounting); *Sekaquaptewa v. MacDonald*, 575 F.2d 239, 243 (9th Cir. 1978) (partition order in land dispute between two Indian Tribes, even though did not direct immediate delivery of property, effectively transferred separate possession and use of lands previously held jointly, thus the order deprived Navajo of use and was sufficiently final to be appealable).

173. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948) (footnotes omitted) (five-four holding that order giving company three choices: to stop withdrawing gas or to purchase from another company or to sell on behalf of another company—was not final and reviewable because the election of any might substantially affect the questions presented for review). See also *Cinerama, Inc. v. Sweet Music S.A.*, 482 F.2d 66, 69 (2d Cir. 1973) (appeal from judgment for defendant for principal amount of its counterclaim was dismissed for lack of appellate jurisdiction where issues remained on the amount of prejudgment interest).

174. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (holding earlier decree disposing of party's claims but requiring further proceedings to divide judgment funds among other parties had been final and reviewable; appeal taken from the later, clearly final decree was too late to raise issues about earlier decree). See *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964) (quoting *Dickinson* as a correct statement of the competing considerations and noting that finality need not necessarily await "the last order possible to be made in a case"). See also *Pettway v. American Cast Iron Pipe, Co.*, 681 F.2d 1259, 1264 (11th Cir. 1982) (wherein the court of appeals considered the inconvenience and cost of piecemeal review on the one hand, and the danger of denying justice on the other, to conclude that a court order directing special master to proceed with determination of back pay awards on

This language identifies the essential considerations and the inevitable categorical balancing.

(6) The Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final.' . . . A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure.¹⁷⁵

The ultimate emphasis is on the pragmatic.

The Court's rejection of extremes inevitably results in a certain disharmony in the precedents. Thus some holdings and opinions support a generous attitude toward finality while others urge a stricter approach. Nonetheless, this series of exemplars is not meant to suggest that finality determinations are merely *ad hoc*. There are clear holdings of appealability and nonappealability categorizing most every ruling which a district court conceivably can make.¹⁷⁶ In fact, the Supreme Court explicitly has warned against a case-by-case approach.¹⁷⁷ Therefore, care is required to find precedent from the high Court and court of appeals' precedent to determine the finality of each particular ruling. Only on those rare occasions when a prior holding does not bind, do the finality policies and "good language" serve as adequate guides.

What can one finally conclude from all of this? As Jerome Frank once observed, "[t]here is, still, too little finality about 'finality.'"¹⁷⁸

C. The Collateral Order Doctrine

The Supreme Court has fashioned the collateral order doctrine in a discrete line of cases interpreting the section 1291 requirement for a "final decision."¹⁷⁹

individual basis met test of finality since effect of order killed class recovery entirely and left open only small number of individual claims); *Curlott v. Campbell*, 598 F.2d 1175, 1179 (9th Cir. 1979) (the court must balance the competing considerations and give "finality" a practical construction).

175. *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962) (footnotes omitted) (raised at oral argument, the finality issue was resolved in favor of appealability of an order requiring a divestiture of a subsidiary and providing that the parent company file with the court a detailed plan for carrying out the divestiture). See also *In re Mason*, 709 F.2d 1313, 1318 (9th Cir. 1983) (court had jurisdiction to review denial of motion to vacate entry of order for relief because the unique nature of bankruptcy procedure dictates that the court take "a pragmatic approach to the question of finality"); *United States v. Hubbard*, 650 F.2d 293, 314 (D.C. Cir. 1980) (orders to unseal documents which were seized during searches of churches were appealable due in part to their "practical finality").

176. See generally 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at §§ 3910-3918 (1976); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 110.08-.16 (for general principles governing when judgment is final).

177. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 439 (1985) ("This Court, however, has expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal."), citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

178. See *United States v. 243.22 Acres of Land*, 129 F.2d 678, 680 (2d Cir.), *cert. denied*, 317 U.S. 698 (1942).

179. See generally 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3911 (1976); 9

Under this expansive interpretation, orders are labeled final and appealable even though the ruling does not terminate the entire action or even any significant part of it. The apparent finality is that the order is a final determination of the issue in question. Appeal is allowed if, and only if: (1) the matter involved is separate from and collateral to the merits; (2) the matter is too important to be denied effective review; (3) review later by appeal from a final judgment is not likely to be effective; and, (4) the matter presents a serious and unsettled question.

The leading case on this point is *Cohen v. Beneficial Industry Corp.*¹⁸⁰ In a stockholders' suit, the defendant corporation moved under state law to require the plaintiff to post a bond for defendant's costs and attorney's fees and then appealed from the denial of the motion. The Supreme Court held the denial was appealable. In the Court's words:

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. . . . Here it is the right to security that presents a serious and unsettled question.¹⁸¹

The collateral order doctrine remains viable today. Recent decisions, however, seem to suggest a more restrictive attitude and some reluctance to find appealability although some particular orders have been held to satisfy the *Cohen* test. Consider a few more recent examples each way. The Court has held in favor of appealability in challenges to: a pretrial order which imposed on the defendants ninety percent of the costs of notifying the members of the plaintiff class;¹⁸² an order denying a claim of immunity raised by a defendant in a motion for summary judgment;¹⁸³ and, an order granting a motion to stay federal litigation to abstain pending similar state litigation.¹⁸⁴ The Court has held nonappealable: the determination that an action may not go forward as a class action;¹⁸⁵ an order refusing to disqualify opposing counsel in a civil case;¹⁸⁶ an order denying a motion to stay federal litigation to abstain pending similar state litigation;¹⁸⁷ and an order denying a motion

MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 110.10, 110.13[9] (for discussion of collateral order doctrine and class action suits).

180. 337 U.S. 541 (1949).

181. *Id.* at 546-47 (footnotes omitted).

182. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974).

183. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985) (qualified immunity); *Nixon v. Fitzgerald*, 457 U.S. 731, 741-43 (1983) (absolute immunity).

184. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 8-13 (1983).

185. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978).

186. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-78 (1981). See *Flanagan v. United States*, 465 U.S. 259, 263-70 (1984) (same for order disqualifying criminal defense attorney).

187. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988).

to dismiss made on the ground that an extradited person was immune from civil process.¹⁸⁸

The Court has refused to expand the collateral order doctrine into a purely pragmatic approach to finality. Consistent with the formalism that generally characterizes finality analysis, the Court has adhered to the factorial approach adopted in *Cohen*. Each factor must be taken into account, no one factor predominates. Furthermore, each factor has a high threshold to be satisfied, and, if any one factor is unsatisfied, then the test is not met. Even a persuasive argument that the order sought to be appealed threatens an injury that cannot effectively be remedied on a later appeal will not, by itself, be enough.¹⁸⁹

D. The Twilight Zone Doctrine

The twilight zone doctrine, sometimes less pejoratively called "pragmatic finality" or the "*Gillespie* doctrine," after the originating decision, is another discrete, though tangential, line of analysis under section 1291.¹⁹⁰ The key is to distinguish language from holdings. Opinion language in this line of decisions would end the finality requirement, if taken literally and if applied frequently, although actual holdings which invoke this doctrine to permit an appeal are rather rare. This line of precedent may be described as essentially moribund but susceptible to some future revitalization.

The major significance of the twilight zone doctrine may be its potential toward modulation of the final/nonfinal formulation. Two preliminary cautions need be mentioned, however. First, the indefiniteness of the analysis could allow the court of appeals something of a jurisdictional "wild-card" to trump nearly any district court decision on a case-by-case basis. That would avoid indirectly what the Supreme Court has refused to avoid directly: the formalism of the final decision requirement in section 1291. For the most part, however, the courts of appeals have not given in to that temptation. Second, this is a peculiar area of finality in which the Supreme Court's role to review state court decisions may differ from the role of the courts of appeals to review district court decisions. So the precedents on finality for the Supreme Court and for the courts of appeals should be, and are understood to be, less interchangeable than usual.

The namesake and original decision is *Gillespie v. United States Steel Corp.*¹⁹¹ In a Jones Act case, the district court struck portions of the complaint asserting claims under state law and an unseaworthiness claim, as well as all claims for the benefit of the members of the family of the decedent except his mother. Even though the district court refused to certify an

188. *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988).

189. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 374-79 (1987).

190. See generally 15 *FEDERAL PRACTICE & PROCEDURE*, *supra* note 41, at § 3913 (1976); 9 *MOORE'S FEDERAL PRACTICE*, *supra* note 84, at ¶ 110.12.

191. 379 U.S. 148 (1964).

interlocutory appeal, the plaintiff appealed and the court of appeals decided the merits and affirmed. The Supreme Court reached the merits following what might be characterized as a "Rod Serling script":

[O]ur cases long have recognized that whether a ruling is "final" within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a "practical rather than a technical construction." . . . [I]n deciding the question of finality the most important compelling considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."¹⁹²

The experience in the courts of appeals is difficult to chronicle. As one might expect from such an enigmatic opinion, *Gillespie* has been interpreted in different ways by different courts of appeals.¹⁹³ Some panels simply have balanced the policies for and against immediate appeal in the particular case. Other panels have used the balancing approach to allow appeal from orders that could have been placed within more traditional finality precedent or have used the balancing approach to dismiss the appeal under the doctrine.¹⁹⁴

192. *Id.* at 152-53.

193. *See, e.g.,* McKnight v. Blanchard, 667 F.2d 477, 479 (5th Cir. 1982) (court applied "death knell" doctrine to find appealability of order which stayed criminal proceedings until appellant's release from prison, even though, on its face, the order was neither final nor an appealable collateral order, because so long a stay would have made it impossible for appellant to produce witnesses and therefore effect of denial of appeal would effectively deny litigant his day in court); *accord* Pettway v. American Cast Iron Pipe Co., 681 F.2d 1259, 1264 (11th Cir. 1982); Doe v. United States, 666 F.2d 43, 46 (4th Cir. 1981); Sherman v. American Fed'n of Musicians, 588 F.2d 1313, 1315 (10th Cir. 1978), *cert. denied*, 444 U.S. 825 (1979); Wescott v. Impresas Armadoras, S.A. Panama, 564 F.2d 875, 881 (9th Cir. 1977); United States v. 58.16 Acres of Land, More or Less in Clinton County, 478 F.2d 1055, 1061 (7th Cir. 1973). *See generally* 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3913 (1976).

194. Some courts apply the *Gillespie* balancing approach where a second theory also establishes finality. *See In re Exennium, Inc.*, 715 F.2d 1401, 1403 (9th Cir. 1983) (where the court granted the appeal under *Gillespie* reasoning and 28 U.S.C. § 1293 which permits the appellate courts to hear questions conclusive of the ultimate outcome in bankruptcy cases); Smith v. Eggar, 655 F.2d 181, 184-85 (9th Cir. 1981) (where the court recognized the order as sufficiently injunctive to justify jurisdiction under 28 U.S.C. § 1292 (a)(1) and, if the order was not sufficiently injunctive, the court found the order fundamental to litigation such that "policy and common sense dictate *Gillespie* to rule"); Virginia v. Tenneco, Inc., 538 F.2d 1026, 1030 (4th Cir. 1976) (although a temporary restraining order is not normally appealable, the court found this order appealable under 28 U.S.C. § 1292 since the appellant entered the order after a full hearing in which all concerned parties had fully participated and the order "bespeaks of the nature of a preliminary injunction . . . rather than an order entered ex parte or on less than a full presentation of the facts." Also, under *Gillespie*, in weighing the practical effect the court found the order essentially granting the plaintiff all the relief sought). Some courts apply the *Gillespie* balancing approach to dismiss the appeal. *See also* Freeman v. Califano, 574 F.2d 264, 267-68 (5th Cir. 1978) (where the court dismissed the appeal under the *Gillespie* approach, finding no threat of denying justice to anyone with the dismissal); Williams v.

The great potential for expansion of appellate jurisdiction feared for in this approach has not been realized. Perhaps because the twilight zone appears so boundless, the courts of appeals have been tentative in their applications, usually preferring to use the doctrine to buttress holdings of appealability based primarily on other grounds. The *Gillespie* holding, in retrospect, may be best understood as an efficient and appropriate rationalization only, as was true in the *Gillespie* case itself, when it is invoked as a justification after the court of appeals has reached the merits and has fully decided the appeal based on a mistaken belief of finality.¹⁹⁵

E. Partial Final Judgments

Rule 54(b) certification is yet another application of section 1291. Rule 54(b) of the Federal Rules of Civil Procedure facilitates the entry of judgment on one or more but fewer than all the claims or as to one or more but fewer than all the parties.¹⁹⁶ The rule provides that such a partial final judgment "is subject to revision at any time before entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."¹⁹⁷ Because modern federal procedure allows for such liberal joinder of claims and parties, contemporary civil actions often become very complex. By allowing for a partial final judgment and an immediate appeal, the rule is a response to the legitimate concern that delay of any appeal until the entire complex action is complete could result in injustice. The successful party thus is relieved of the effects of any delay and from the need to participate in the extended trial proceeding. The rule allows a prompt appeal and provides some certainty for the appellate procedure in today's complex suits. In doing so, the rule expressly rejects the notion that an entire case is the judicial unit for appealability. However, the rule reaffirms and incorporates the "final decision" requirement, as it must be satisfied for the partial judgment.¹⁹⁸

Generally, Rule 54(b) may be followed if, and only if: (1) more than one claim is presented or multiple parties are involved and the matter in question is separable; (2) the district court issues a certificate expressly determining that there is no just reason for delay; and, (3) the district court expressly directs the entry of a Rule 54(b) judgment which is a final and ultimate disposition of the matter.

Mumford, 511 F.2d 363, 366 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 828 (1975) (court dismissed appeal on the certification of a class action since the individual plaintiffs had sufficient incentive to continue the suit without class action certification).

195. 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3913 (1976); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 110.12.

196. See generally 10 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at §§ 2656-2661 (1983); 6 MOORE'S FEDERAL PRACTICE, *supra* note 157, at ¶¶ 54.23[1]-[2], 54.28[2].

197. FED. R. CIV. P. 54(b). See *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 860 F.2d 1441, 1445 (7th Cir. 1988) (construing Rule 54(b)).

198. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 431-38 (1956).

Each of these requirements can be a catch-point. In the absence of the express determination and direction in a Rule 54(b) certificate, any order adjudicating fewer than all claims against all parties normally is subject to any revision by the district court until the entry of a final and comprehensive judgment. The entry of a Rule 54(b) certificate is not automatic or required and is committed initially to the district court's discretion. Without a Rule 54(b) certificate, an appeal must be dismissed unless the judgment is appealable on other grounds. The court of appeals is not bound to decide the appeal, however, even when there is a certificate. The appeal under a certificate will nevertheless be dismissed if the order is not final, if the threshold multiplicity does not exist or if, despite the deference owed, the court of appeals concludes that the district court abused the discretion to issue the certificate.

The Supreme Court elaborated on the respective roles of the district court and the court of appeals in *Curtiss-Wright Corp. v. General Electric Co.*¹⁹⁹ The plaintiff sued on various claims for breach of multiple contracts, including a demand for a liquidated balance that admittedly remained unpaid. Defendant filed counterclaims based on the same contracts. On a motion for summary judgment, the district court rejected the defendant's only defense against payment of the unpaid balance and entered a Rule 54(b) judgment on that claim. The court of appeals dismissed for an abuse of discretion because the unresolved counterclaims made the certificate inappropriate.

The Supreme Court reversed the court of appeals and held the Rule 54(b) certificate had been properly issued by the district court. The Court opined that Rule 54(b) treatment should not be reserved for only the extreme cases, but also should not issue merely upon the request of the parties. The "no just reason for delay" element is to be emphasized. This element has two components: the interest of judicial administration and the equities of the parties. The former component requires the thoughtful scrutiny of the court of appeals within contemplation of the general finality principle. The latter component, by contrast, is peculiarly within the district court's informed discretion, to be exercised on a fact-bound basis.

The chief purpose of the rule is to accommodate the final decision requirement to complex litigation with multiple parties or multiple claims. This functional approach to Rule 54(b) assures flexibility to accomplish immediate enforcement or to allow immediate appellate review.²⁰⁰

199. 446 U.S. 1 (1980).

200. See *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956). The *Mackey* court explained that Rule 54(b) does not relax the finality requirement but does provide a practical means of permitting appeal taken from one or more final decisions on individual claims, in multiple claims actions, without waiting for final decisions to be rendered on all claims in the case. *Id.* at 434-35. "To meet the demonstrated need for flexibility the district court is used as a 'dispatcher.' It is permitted to determine, in the first instance, the appropriate time when each 'final decision' upon 'one or more but less than all' of the claims in a multiple claims action

IV. APPEALS FROM INTERLOCUTORY ORDERS—CIVIL

A. Generally

This Part chronicles the widening statutory exceptions to the requirement of finality.²⁰¹ Both the general policy and the statute equate appealability with finality. At one time, interlocutory orders were just that—interlocutory. Not until 1891—the year the circuit courts were created—was there a provision for an interlocutory appeal, and that covered only orders granting or continuing injunctions.²⁰² Statutory exceptions to the general rule of finality, however, have grown in number and significance ever since.²⁰³

As is true of the federal appellate power to review final decisions, jurisdiction over interlocutory appeals is entirely a creature of statute. Inexorably, Congress has widened the appellate power. The Supreme Court has explained the process: "[Exceptions] seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence. When the pressure rises to a point that influences Congress, legislative remedies are enacted."²⁰⁴ The various statutory exceptions demonstrate a congressional recognition that a too rigid adherence to the finality requirement can work a severe hardship within the litigation and beyond. Furthermore, a categorical approach to appealability can frustrate the very policies sought to be served by finality.

Because these provisions create exceptions to the general history and tradition against interlocutory appeals, the statutes are narrow in language,

is ready for appeal." *Id.* at 435. See also *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 363 (3d Cir. 1975) (rule 54(b) attempts to strike a balance between piecemeal litigation and the need to make review available at a time that best serves the needs of the parties). *But see Consolidated Rail Corp. v. Fore River Ry. Co.*, 861 F.2d 322, 325 (1st Cir. 1988). In *Fore River*, the court dismissed part of the appeal because the district court improperly certified its judgment under Rule 54(b). The court explained that to qualify as a 54(b) judgment, the court must first decide if the judgment is final, and second, must ascertain that no reason for delay existed. In this case, the court found reason for delay in light of the fact that the same parties on appeal remained contestants below. *Id. Accord Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 860 F.2d 1441, 1445 (7th Cir. 1988) (court independently considered its Rule 54(b) jurisdiction and dismissed appeal for lack thereof).

201. See generally 16 *FEDERAL PRACTICE & PROCEDURE*, *supra* note 41, at § 3920 (1977); 9 *MOORE'S FEDERAL PRACTICE*, *supra* note 84, at ¶ 110.16.

202. Act of March 3, 1891, § 7, 26 Stat. 826, 828. See *supra* Part I(B).

203. See *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 n.8 (1981) ("Because rigid application [of the finality rule] was found to create undue hardship in some cases . . . Congress created certain exceptions" including, among others, appeal as of right from interlocutory orders of the district court and appeal from district court orders refusing injunction requests); *Stewart-Warner Corp. v. Westinghouse Elec. Corp.*, 325 F.2d 822, 829-30 (2d Cir. 1963) (Friendly, J., dissenting) (noting statutory exceptions, found in section 129 of the Judicial Code of 1911, 36 Stat. 1134, where an injunction is granted, continued, refused, or dissolved by an interlocutory order, or an application to dissolve an injunction is refused), *cert. denied*, 376 U.S. 944 (1964).

204. *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955) (footnote omitted).

narrow in interpretation, and narrow in application. It is important to note that there is much less "play in the joints" here than there is in the "final decision" provision in section 1291. Once jurisdiction obtains, however, the interlocutory appeal brings before the court of appeals all aspects of the case illuminated by the order on review.²⁰⁵

Tautologically, interlocutory orders may be divided into reviewable orders and nonreviewable orders.²⁰⁶ "Nonreviewable" here has something of a temporal connotation. An interlocutory order that is not immediately reviewable under the statutes considered in this section might serve as the basis for an immediate application for an extraordinary writ²⁰⁷ and, certainly, would be cognizable on any eventual appeal from a final judgment. Interlocutory appeals of reviewable orders may be subdivided into entitled interlocutory appeals and permissive interlocutory appeals. The former are brought in the discretion of the party; the latter require court permission. One last point bears emphasis: so-called entitled interlocutory appeals are discretionary with the appellant, not mandatory. Should a party decline to take advantage of the possibility of an immediate appeal, the issue still may be raised on appeal from the eventual final judgment.

B. *Entitled Interlocutory Appeals*

Section 1292(a) of Title 28²⁰⁸ provides the courts of appeals with jurisdiction of appeals as of right in three types of interlocutory orders dealing with injunctions, receivers, and admiralty matters. Each type of entitled interlocutory appeal—sometimes referred to as "interlocutory appeals as of right"—will be discussed briefly here.

Subsection (1) of section 1292(a) defines an entitled interlocutory appeal of an order "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."²⁰⁹ A prolific source of appeals, this subsection accounts for the largest number of interlocutory appeals, entitled or permissive. Once obtained, appellate review extends to all matters necessary to determine the propriety of the order, going so far as to review the merits to order a dismissal.²¹⁰ A working definition of an

205. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 755-57 (1986).

206. Here the terms "reviewable" and "non-reviewable" are preferred to the terms "appealable" and "non-appealable" because the former pair distinguish orders based on the power of the court of appeals, and the latter pair may be misunderstood to be in the complete control of the litigants. An appeal from an order might be taken improperly to require the court of appeals to dismiss for want of jurisdiction. Such an appeal may broadly and imprecisely be thought of as "appealable" but could not be mistaken as "reviewable."

207. *See infra* Part V(C).

208. 28 U.S.C. § 1292(a) (1982).

209. *Id.* § 1292(a)(1). *See generally* 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at §§ 3921-24 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 110.20-.20[5].

210. *Thornburgh*, 476 U.S. at 755-57.

"injunction" for purposes of section 1292(a)(1) is an order addressed to a party which is enforceable by contempt "and designed to accord or protect some or all of the substantive relief sought" in the action.²¹¹ Based on the duration of the order and whether there was notice and a hearing, and on the nature of the showing made, the courts of appeals distinguish between preliminary injunctions (which are appealable) and temporary restraining orders (which are not appealable).²¹² Denial of an injunction may be implicit as well as express. For example, if the order has the practical effect of refusing injunctive relief, there is an entitlement to an interlocutory appeal so long as there are immediate and serious consequences.²¹³ In a recent holding, the Supreme Court eliminated an anomalous exception to make the general rule more whole: an order by a district court which relates only to the conduct or progress of litigation before that court is not considered an injunction. The Court thus finally stopped distinguishing the appealability of various stays based on irrelevant remnants of the dichotomy between equity and law.²¹⁴

In characterizing orders for appealability under section 1292(a)(1), the view taken by the district court necessarily is the beginning point of analysis. An apparent belief by the district court and the parties that the subject order was in the nature of injunctive relief goes a long way toward a finding of appealability. Nonetheless, because the label used itself does not control, circuit court precedent elaborates on the definition of an interlocutory order "granting, continuing, modifying, refusing or dissolving . . . or refusing to dissolve or modify" an injunction.²¹⁵ The growing understanding is that this subsection is to be saved for orders of serious, perhaps irreparable, conse-

211. 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3922 (1977) (citing *International Prods. Corp. v. Koons*, 325 F.2d 403, 406 (2d Cir. 1963)).

212. *E.g.*, *Sampson v. Murray*, 415 U.S. 61, 86 n.58 (1974) (the court found that the temporary restraining order granted by the district court, which continued beyond the time permissible, should be treated as a preliminary injunction).

213. *Compare* *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480-82 (1978) (denial of class action status not appealable because it would not have an "irreparable" effect") with *Carson v. American Brands, Inc.*, 450 U.S. 79, 86-90 (1981) (refusal to approve consent decree which would have barred racial discrimination in hiring is appealable because the petitioners, in establishing that the refusal precluded them from settling on their own terms and precluded an immediate restructuring of respondent's transfer and promotional policies, showed that they would suffer a "serious, perhaps irreparable, consequence").

214. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) (rejecting the *Enelow-Ettelson* rule, by which a federal court order regarding a stay of its own proceedings was appealable under 28 U.S.C. § 1292 (a)(1) only if the action was by its nature an action at law and the order was based on an equitable defense or counterclaim), *overruling* *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942) and *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935). See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3923 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 110.20[3].

215. See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3924 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 110.20[1]-[2].

quence so as not to compromise unduly the basic policy against piecemeal appeals.²¹⁶

Subsection (2) of section 1292(a) defines a second entitled interlocutory appeal of "orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property."²¹⁷ A practice of strict construction has limited this subsection to its literal meaning.²¹⁸ A character of equity, a receiver is appointed by the court with managerial powers over the property.²¹⁹ Much of the litigation under this subsection considers whether an order does in fact create a receivership. The analogy then to subsection (1) and injunctions is obvious. The most important textual difference is that subsection (2) does not permit an appeal if the district court refuses to act, while a grant or a denial of an injunction does trigger an entitled appeal under subsection (1). Thus, a refusal to appoint, in the first place, is not appealable under subsection (2). An order "refusing orders to wind up [a]

216. See *Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 (1966) (Court cautions that section 1292(a) must be "approach[ed] somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders"); *Administrative Mgmt. Serv., Ltd. v. Royal Am. Managers, Inc.*, 854 F.2d 1272, 1279 (11th Cir. 1988) (court refused immediate appeal of denial of motion to compel arbitration under section 1292(a)(1) as the parties could obtain relief upon review after trial and thus had not suffered irreparable consequences); *Wagner v. Taylor*, 836 F.2d 578, 586 (D.C. Cir. 1987) (where the court granted the appeal of the district court's order denying a class certification motion since a review of a denial of a preliminary injunction request would be seriously impaired without effective review of this order); *McNasby v. Crown Cork & Seal Co., Inc.* 832 F.2d 47 (3d Cir. 1987) (where the court recognized that the Supreme Court has cautioned that section 1292(a)(1) "must be narrowly construed to conform to . . . policy against piecemeal litigation"), *cert. denied*, 108 S. Ct. 1112 (1988); *Donovan v. Robbins*, 752 F.2d 1170, 1173-74 (7th Cir. 1985) (where the court granted the appeal of a district court's refusal to approve a consent decree since the appellant specifically showed that the order caused irreparable harm in that it imposed an indefinite delay on the protection of pension rights). See generally *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 379 (1987) (respondent's appeal from a district court order denying a request to intervene but granting limited permissive intervention failed for lack of serious consequences); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978) (district court's denial of petitioner's request for class certification was not appealable because it would not have an irreparable effect).

217. 28 U.S.C. § 1292(a)(2) (1982).

218. See *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1020 (2d Cir. 1975) (where the court denied the appeal of an order approving an expenditure since the statute applies only to the refusal to grant an application to complete a receivership by sale or other disposition); *United States v. Chelsea Towers, Inc.*, 404 F.2d 329, 330 (3d Cir. 1968) (where the court dismissed the appeal from an order requiring escrow accounts and security deposits be turned over to a receiver); *Belleair Hotel Co. v. Mabry*, 109 F.2d 390, 391 (5th Cir. 1940) (where the court denied the appeal of an order authorizing the receiver to lease a tourist hotel and other buildings in his possession since it was not an order refusing to take appropriate steps to wind up receivership). See generally 16 *FEDERAL PRACTICE & PROCEDURE*, *supra* note 41, at § 3925 (1977); 7 (Part 2) *MOORE'S FEDERAL PRACTICE*, *supra* note 46, at ¶ 66.04[3].

219. See *FED. R. CIV. P.* 66 (receivers appointed by federal courts). See generally 12 *FEDERAL PRACTICE & PROCEDURE*, *supra* note 41, at § 2983 (1973); 7 (Part 2) *MOORE'S FEDERAL PRACTICE*, *supra* note 46, at ¶ 66.04[1].

receivership," which is made appealable under subsection (2),²²⁰ is a refusal to end a receivership that has become unnecessary or has been completed.

Subsection (3) of section 1292(a) defines a third entitled interlocutory appeal from decrees "determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."²²¹ The courts of appeals, even panels of the same circuit, cannot seem to agree on whether this provision, which is a holdover from before the 1966 merger of the admiralty and civil procedures, should be read broadly or narrowly.²²² There is no readily apparent reason why admiralty cases deserve a significantly more liberal practice of interlocutory appeals. No matter, for a few accepted rules will suffice for the present consideration. An "admiralty case" is either a case cognizable only within the exclusive original jurisdiction of the district court or a case which falls within some other head of federal jurisdiction as well as the federal admiralty jurisdiction and is nominated as an admiralty case.²²³

C. Permissive Interlocutory Appeals

Section 1292(b) of Title 28 provides:

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however, [t]hat application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.*²²⁴

First adopted in 1958, this provision is the latest statutory qualification of the general requirement for finality.²²⁵ It is best understood as a compromise between, on the one hand, those who were committed to finality and

220. 28 U.S.C. § 1292(a)(2) (1982).

221. *Id.* § 1292(a)(3).

222. Compare *Walter E. Heller & Co. v. O/S Sonny V*, 595 F.2d 968, 971 (5th Cir. 1979) (giving section 1292(a)(3) a broad reading) with *Hollywood Marine, Inc. v. M/V Artie James*, 755 F.2d 414, 416 (5th Cir. 1985) (reading section 1292(a)(3) narrowly).

223. See *Borne v. A & P Boat Rentals No. 4, Inc.*, 755 F.2d 1131, 1133 (5th Cir. 1985) (where the court denied the appeal since the plaintiff "prayed for trial by jury, he did not invoke admiralty jurisdiction and he made no reference to FED. R. Civ. P. 9(h)"). See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3927 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 110.19[3].

224. 28 U.S.C. § 1292(b) (1986) (emphasis in original). See generally Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975).

225. See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, § at 3929 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 110.22-.22[5].

hostile to interlocutory appeals and, on the other hand, those who favored giving the courts of appeals discretionary jurisdiction to review any and all interlocutory appeals. Given the docket explosion experienced since 1958 by the courts of appeals, it is not likely that this particular debate will be rejoined anytime soon. Indeed, current suggestions in favor of discretionary jurisdiction for the courts of appeals would move in the other direction to make even appeals from final judgments a matter of grace, in order to cope with burgeoning appellate dockets.²²⁶ Furthermore, the experience under section 1292(b) does not demonstrate any pent-up pressure for further legislative relaxation of the finality policy.

Obviously, section 1292(b) is the most explicit departure from the general policy in favor of finality and against interlocutory appeals.²²⁷ While the available statistics do not disclose the frequency with which this provision is invoked and denied in the district courts, only an estimated 100 appeals are brought under section 1292(b) each year.²²⁸ The provision therefore goes largely unused, considering that there are more than 35,000 federal appeals filed each year. Perhaps, appellate attitudes influence this disuse; approximately one-half of the appeals that are attempted under this section are refused.²²⁹ While both legislative history and case law support the attitude that section 1292(b) should be saved for the rare and exceptional order, the run of actual applications does not adhere to a narrow interpretation with an absolute consistency. The certification by the district court and the permission to appeal by the court of appeals, each independent evaluations, for the most part follow the straightforward procedure and criteria of the statute.²³⁰

The criteria in the statute are rather straightforward in summary, although their application may become more subtle and the outcomes are highly eclectic.²³¹ Primarily, there must be "an order." The district court must

226. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 Sw. L.J. 1151, 1152 (1981).

227. See 16 FEDERAL PRACTICE AND PROCEDURE, *supra* note 41, at § 3929 (1977).

228. *Id.*

229. *Id.*

230. See FED. R. APP. P. 5. See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3930 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 110.22[2]-.22[5].

231. Compare *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982) (where the court explained that appeals under section 1292(b) would be allowed in those exceptional cases where the appeal would avoid protracted and expensive litigation) with *Cates v. United States*, 451 F.2d 411, 414 (5th Cir. 1971) (where the court explained appeals would be allowed based on equity and the judge's good conscience). Compare *Atlantic City Elec. Co. v. General Elec. Co.*, 337 F.2d 844, 845 (2d Cir. 1964) (court denied appeal on question of whether plaintiff could collect damages for costs it had passed on to its customers) with *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 335 F.2d 203 (7th Cir. 1964) (court allowed same type of appeal without comment on the jurisdictional issue). See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3931 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 110.22[2].

enter the predicate order and decide the issue to be certified.²³² Whether to enter the separate certificate is in the discretion of the district court, and it may be entered *sua sponte* or on motion; there is no set form. The order also must be "not otherwise appealable."²³³ Matters "otherwise appealable" include outright final decisions and the equivalents to final decisions;²³⁴ a Rule 54(b) certificate may be optional with a section 1292(b) certificate;²³⁵ and, a section 1292(b) certificate is preferred over an extraordinary writ.²³⁶ The "controlling question of law"²³⁷ criterion means that factual questions do not qualify and that appeals from the exercise of district court discretion are not ordinarily permitted. The legal question must be central and important to the litigation. There must be a "substantial ground for difference of opinion."²³⁸ An example of an appropriate occasion might be an issue of first impression in a circuit on which there is a conflict among the other courts of appeals. There should be some doubt on the issue. The possibility of avoiding trial proceedings or, at least, significantly simplifying pretrial or trial proceedings, is enough to satisfy the next related criterion that the interlocutory appeal "materially advance the ultimate termination of the litigation." Finally, once the district court issues the certificate, the court of appeals "may thereupon, in its discretion, permit an appeal."²³⁹ This last criterion obliges the reviewing court to evaluate the prudence of the district court in issuing the certificate somewhat analogously to the exercise of discretion on the part of the court of appeals to grant an extraordinary writ.²⁴⁰ But more than this, the court of appeals is to exercise an independent discretion by taking into account factors beyond the proper contemplation of the district court, such as the state of the appellate docket. This appellate discretion seems wide open.

All of the criteria are to be figured into the calculi of the district court and of the court of appeals, in turn, considered against the background purposes of section 1292(b). Once granted, the scope of review is closely limited to the order appealed from and the issue justifying the certification.²⁴¹

V. REVIEW BY WRIT

A. Generally

Proceedings considered in this Part are formally commenced by an original application to the court of appeals.²⁴² This form of original jurisdiction may

232. See 28 U.S.C. § 1292(b) (Supp. IV 1986).

233. *Id.*

234. See *supra* Parts III(B), (C) & (D).

235. See *supra* Part III(E).

236. See *infra* Part V(C).

237. See 28 U.S.C. § 1292(b) (Supp. IV 1986).

238. *Id.*

239. *Id.*

240. See *supra* Part V(C). See generally Note, Section 1292(b): Eight Years of Undefined Discretion, 54 GEO. L.J. 940 (1966).

241. See *United States v. Stanley*, 483 U.S. 669, 676-78 (1987).

242. See 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3932 (1977).

be considered a remnant of the early history of the circuit courts with their hybrid appellate and original jurisdiction.²⁴³ Broadly considered, however, the power to issue writs should be characterized as an appellate power.²⁴⁴ More metaphysical issues concerning the inherent power of the courts of appeals are preempted, for the most part, by specific statutory authorizations to issue the writ of habeas corpus, to grant all writs necessary or appropriate in aid of their jurisdiction, and to impose appropriate sanctions.²⁴⁵

B. Relief in the Nature of Habeas Corpus

History informs an understanding of habeas jurisdiction.²⁴⁶ The old circuit courts, part original and part appellate tribunals, had jurisdiction to issue writs of habeas corpus.²⁴⁷ The Evarts Act of 1891 created additional circuit judgeships and gave all circuit judges habeas jurisdiction.²⁴⁸ The 1911 legislation,²⁴⁹ however, ended the trial jurisdiction of the circuit courts along with their habeas jurisdiction. The "new" 1911 courts of appeals were not given the power to issue the writ of habeas corpus, apart from the all writs statute.²⁵⁰ Nor have the courts of appeals *qua* courts ever been given power to issue such a writ. Consequently, the historical anomaly persists to the present day that the courts of appeals lack power to grant the writ, although individual circuit judges do possess that authority.²⁵¹ Section 2241 of Title

243. See *supra* Part I(B).

244. See *Ex parte* Republic of Peru, 318 U.S. 578, 582 (1943) ("the historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior court"); *Ex parte* Crane, 30 U.S. (Pet.) 190, 193 (1831) ("a mandamus to an inferior court of the United States, is in the nature of appellate jurisdiction"). See also Berger, *The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control*, 31 BUFF. L. REV. 37 (1982) (addressing use of mandamus as an internal judicial control device).

245. See *supra*, Part I(C). See generally Bell, *The Federal Appellate Courts and the All Writs Act*, 23 SW. L.J. 858 (1969).

246. See L. YACKLE, POSTCONVICTION REMEDIES § 18 (1981).

247. Prior to the All Writs Act, Section 14 of the Judiciary Act of 1789 granted federal courts the power to issue extraordinary writs in aid of their respective jurisdiction. See Bell, *supra* note 245, at 859. Section 14 provided that "all the . . . courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law . . ." Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 81-82.

248. Act of March 3, 1891, ch. 517, 26 Stat. 826.

249. Act of March 11, 1911, Pub. L. No. 61-475, 36 Stat. 1087.

250. The All Writs Act, as now codified at 28 U.S.C. § 1651(a) (1982), is the direct descendent of section 14 of the First Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 81-82. The 1948 recodification of the All Writs Act did not affect the power of the courts of appeals to issue writs of mandamus in aid of their jurisdiction. See *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957).

251. See *Parker v. Sigler*, 419 F.2d 827, 828 (8th Cir. 1969) (courts of appeals are given no jurisdiction to entertain original petitions for habeas corpus and are without jurisdiction to entertain such, but individual circuit judges do have jurisdiction over original habeas corpus petitions). See also FED. R. APP. P. 22(a) advisory committee notes (a court of appeals has no jurisdiction as a court to grant an original writ of habeas corpus).

28, authorizes "the Supreme Court, any justice thereof, the district courts and any circuit judge" to issue the writ of habeas corpus.²⁵² The federal remedy for state prisoners repeats that empowerment,²⁵³ and the federal remedy for federal prisoners authorizes application in the sentencing court with an appeal to the court of appeals "as from a final judgment."²⁵⁴ But the jurisdiction over habeas corpus vested in the individual circuit judge has small practical significance. The statute authorizes a transfer of the application for habeas corpus to "the district court having jurisdiction to entertain it."²⁵⁵ Circuit judges thus follow the practice of Supreme Court justices and decline to entertain original petitions in most cases.²⁵⁶ Nonetheless, the power to issue the writ of habeas corpus remains part of the jurisdiction of the circuit judge.²⁵⁷

C. "All Writs Necessary or Appropriate"

Writ lore is a somewhat murky tradition in federal appellate procedure.²⁵⁸ Section 1651(a) of Title 28, the "All Writs Act" provides, in part: "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law."²⁵⁹ This original jurisdiction allows for interlocutory review of district court orders through issuance of extraordinary writs by the court

252. 28 U.S.C. § 2241(a) (1982).

253. 28 U.S.C. § 2254(a) (1982). *See also* 28 U.S.C. § 2253 (1982) (requirement of certificate of probable cause to appeal); FED. R. APP. P. 22(b).

254. 28 U.S.C. § 2255 (1982).

255. 28 U.S.C. § 2241(b) (1982).

256. *E.g.*, *Henderson v. Missouri*, 661 F.2d 107 (8th Cir. 1981) (court transferred petition for habeas corpus to district court with directions that the petition be dismissed for failure to exhaust state remedies). *See* FED. R. APP. P. 22(a) ("If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court"). *See also* 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3968 (1977) (discussing same).

257. *See* *Ojeda Rios v. Wigen*, 863 F.2d 196, 199 (2d Cir. 1988) (Chambers opinion of Newman, J.) (where a prisoner's petition for habeas corpus was not in aid of the court's appellate jurisdiction, it was appropriate for consideration by an individual judge and not by a panel); *Zimmerman v. Spears*, 565 F.2d 310, 316 (5th Cir. 1977) (although an individual judge of the courts of appeal has jurisdiction to entertain an original petition for habeas corpus, the court rejected petitioner's suggestion that a single judge consider the petition because it was not the ordinary procedure contemplated by FED. R. APP. P. 22); *Porter v. Sigler*, 419 F.2d 827, 828 (8th Cir. 1969) (per curiam) (although individual circuit judges, approved by the courts of appeals, have jurisdiction to entertain an original habeas corpus petition, the ordinary procedure under FED. R. APP. P. 22(a) is to transfer an original habeas corpus application to the district court). In *Porter*, the district court had already considered the issue raised in petitioner's application, consequently the petition was dismissed by the court of appeals for want of jurisdiction. *Id.* *See generally* 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3968 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 222.01-.04.

258. *See generally* 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at §§ 3932-3934 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 110.26,.28.

259. 28 U.S.C. § 1651(a) (1982).

of appeals. Mandamus and prohibition are most often used, although "all writs" is meant to include certiorari, habeas corpus, and even a generic no-name writ.²⁶⁰ In contrast to the restraint that characterizes the jurisdictional determination, the courts of appeals generally exhibit a rather relaxed attitude toward the form of the writ and its actual issuance.

The statute authorizes the courts of appeals to issue writs in aid of their jurisdiction.²⁶¹ At a minimum, then, the matter must fall within the potential jurisdiction of the court of appeals. Writs are deemed extraordinary²⁶² and, by axiom, will not be used as a mere substitute for review,²⁶³ although in doubtful circumstances sometimes a single appellate filing will seek an extraordinary writ and appellate review in the alternative.²⁶⁴ The writ must be necessary to assert appellate supervision which cannot later be asserted effectively after an otherwise appealable order, or to remove an obstruction to subsequent appellate review. Most often, a writ will issue to prevent a district court from acting beyond its jurisdiction or to compel a district court to take an action that it lacks power to withhold.²⁶⁵ While rarely exercised,

260. See 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 110.26 & n.23. The particular label attached to the petition should be unimportant, however, so long as the relief sought is clearly set out. See *Ex parte Simmons*, 247 U.S. 231 (1918).

261. See *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943) (authority of circuit courts of appeals to issue mandamus is restricted to cases in which the writ is in aid of appellate jurisdiction).

262. See *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394 (1976) (remedy of mandamus within the federal court system is a drastic one, to be invoked only in extraordinary situations, amounting to a judicial "usurpation of power"); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953) (the supplementary review power conferred on the courts by congress in the All Writs Act is meant to be used only in exceptional cases where there is a clear abuse of discretion or usurpation of judicial power); *Ex parte Fahey*, 332 U.S. 258, 260 (1947) (as extraordinary remedies, writs are reserved for really extraordinary causes).

263. See *Bankers Life & Casualty*, 346 U.S. at 379 (extraordinary writs cannot be used as a substitute for appeal, even though hardship may result from delay, and perhaps unnecessary trial, and whatever may be done without the writ may not be done with it); *Roche v. Evaporated Milk Ass'n*, 319 U.S. at 21 (mandamus may not ordinarily be resorted to as a mode of review where a statutory method of appeal has been prescribed, or to review an appealable decision of record).

264. *E.g.*, *Will v. United States*, 389 U.S. 90, 104-07 (1967) (vacated writ of mandamus issued by court of appeals where the record on review revealed no circumstances calling for the "'drastic and extraordinary' nature of the mandamus remedy"); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30-31 (1943) (reversed court of appeals' issuance of a writ of mandamus where the district court's decision involved no abuse of judicial power, since "[o]n issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress").

265. See 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3933 (1977). See also *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) ("traditional use of the writ in aid of appellate jurisdiction . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so"); *Three J Farms, Inc. v. Alton Box Board Co.*, 609 F.2d 112 (4th Cir. 1979) (mandamus appropriate in aid of appellate jurisdiction to confine an inferior court to a lawful exercise of its prescribed jurisdiction).

this authority is by no measure weak: the holdings admit to a naked power to review immediately even an order that could be reviewed effectively on later appeal.²⁶⁶

The extraordinary nature of the writs is underscored by the discretion surrounding their issuance.²⁶⁷ The discretion of the court of appeals to exercise the power defines the proper circumstances in which to grant a writ. But that discretion defines particular circumstances even more clearly in which to deny a writ. Writs are not entitled appeals, as are reviews of final decisions and section 1292(a) interlocutory appeals. The characteristic of restraint of discretion, of a power properly withheld, comes from the common law history of the writs and is reinforced, of course, by the notion of limited federal jurisdiction. Although the phrase "clear and indisputable" is used to describe the rights protected by extraordinary writs,²⁶⁸ that phrase does not establish a threshold of certainty.²⁶⁹ The issue on review may be doubtful and difficult and yet still justify a writ. However, a writ will not issue to determine the merits of the ruling that has been withheld,²⁷⁰ but will issue to compel a district court to rule on a matter which has been improperly deferred.²⁷¹ Thus, a writ does not direct the district court to rule one way or the other but only to cease withholding a ruling.

The extraordinary writs are the vehicle for the exercise of two important and distinct responsibilities of the federal appellate courts. The courts of appeals hold both a supervisory authority and an advisory authority over the district courts in the federal judicial hierarchy.²⁷² The courts of appeals

266. *E.g.*, *La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957) (since court of appeals could at some stage of antitrust proceedings entertain appeal therein, it had power, in proper circumstances, to issue writs of mandamus to compel district judge to vacate interlocutory orders referring such cases to a master for trial).

267. *See Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 402 (1976) (issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943) (common law writs, like equitable remedies, may be granted or withheld in the court's sound discretion). *See also* *Thirteenth Regional Corp. v. United States Dep't of Interior*, 54 F.2d 78 (D.C. Cir. 1980) (court has the authority to refrain from issuing a writ of mandamus, for the exercise of the power of mandamus is a matter committed to the sound discretion of the trial court). *See generally* 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3933 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 110.26.

268. *See Kerr*, 426 U.S. at 394 (party seeking issuance of writ of mandamus must have no other adequate means to attain the relief he desires and must satisfy burden of showing that his right to issuance of the writ is "clear and indisputable").

269. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). *See also* 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3933 (Supp. 1987); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 110.28.

270. *See, e.g.*, *In re Montes*, 77 F.2d 415 (5th Cir. 1983); *I-T-E Circuit Breaker Co. v. Becker*, 343 F.2d 361 (8th Cir. 1965); *Merritt-Chapman & Scott Corp. v. Kent*, 309 F.2d 891 (6th Cir.), *cert. dismissed*, 372 U.S. 982 (1962).

271. *See* 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3933 (1977).

272. 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3934 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 110.28.

advise the district courts on difficult and novel issues which cannot or should not await final appeal, and they supervise the district courts by remedying unusual categories of error.²⁷³ Still, the courts of appeals need to be sensitive to the potential for abuse in the writ procedure, by which a district judge becomes a litigant as the respondent.²⁷⁴ Furthermore, although there may be a case-by-case preference for a section 1292(b) certificate for permissive appeal, the writs are best understood as a supplement to the interlocutory appeal routes.²⁷⁵

Although writ practice is now rather arcane,²⁷⁶ few situations regularly recur in which the writ will issue: (1) when a jury trial has been denied improperly;²⁷⁷ (2) when an allegation of district court misconduct raises a general procedural matter of first impression;²⁷⁸ and, (3) when a district court has acted improperly to remand a case previously removed from state court.²⁷⁹ The "last word" on the writs from the Supreme Court, however, reemphasizes their extraordinary nature and portends an era of self-restrained caution.²⁸⁰

D. Appellate Sanctions

By statute and rule, reinforced by their inherent power, the courts of appeals have jurisdiction to impose appropriate sanctions on those who abuse the appellate process.²⁸¹ The law of sanctions is developing rapidly and may best be described as uncertain.²⁸² Section 1927 of Title 28 provides

273. See 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3934 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 110.28.

274. See FED. R. APP. P. 21(b) ("The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. . . . If the judge or judges named respondents do not desire to appear in the proceedings, they may so advise the clerk and all parties by letter").

275. See *supra* Part IV(C).

276. See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, § 3935 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 110.28.

277. *E.g.*, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479-80 (1962) (court of appeals should have granted petition for mandamus where district judge erred in refusing to grant demand for trial by jury on factual issues related to breach of contract); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959) (holding that mandamus is available under the All Writs Act, 28 U.S.C. § 1651, to require a jury trial).

278. *E.g.*, *Schlagenhauf v. Holder*, 379 U.S. 104, 109-12 (1964).

279. *E.g.*, *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352-53 (1976).

280. *E.g.*, *Allied Chem. Corp. v. Dai-Itan, Inc.*, 449 U.S. 33, 35 (1980) (*per curiam*); *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661-62 (1978) (holding that "[o]nly exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation [of mandamus]").

281. See FED. R. APP. P. 38. See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3984 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 238.01-.02.

282. See *e.g.*, G. JOSEPH, *SANCTIONS: THE LAW OF LITIGATION ABUSE* (1988); W. FREEDMAN, *FRIVOLOUS LAWSUITS AND FRIVOLOUS DEFENSES: UNJUSTIFIABLE LITIGATION* §§ 1.3, 10.2 (1987).

that any attorney who "multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct."²⁸³ Section 1927 went largely ignored, prior to the recent fad for sanctions, engendered in part by amendments to Federal Rule of Civil Procedure 11²⁸⁴ and by a virtual siege response to the federal docket crisis.²⁸⁵ Section 1927 is limited to attorneys but covers all cases and all proceedings in federal court, including appeals.²⁸⁶ The circuits are split over whether "unreasonably and vexatiously" requires subjective bad faith²⁸⁷ or only an objective misconduct standard.²⁸⁸

Two other provisions are even broader. Federal Rule of Appellate Procedure 38, an echo of section 1912 of Title 28 authorizes "just damages," including attorneys' fees, and single or double costs upon a determination that an "appeal is frivolous."²⁸⁹ This determination is within the discretion of the court of appeals. An appeal may be deemed frivolous when a result is so inevitable and obvious as to be preordained or if the arguments raised are wholly without merit.²⁹⁰ The test is an objective standard and persons

In Section 1.3, Freedman discusses the frivolous appeal:

The definition of a frivolous appeal is a basic question that confronts the appellate court which must look at the case itself to ascertain whether it is without merit and has little chance to succeed, and then the court must look at the conduct of the appellant to see whether he is dilatory, seeks to harass the court or the adversary, or simply desires to mislead the court. . . . The merits of an appeal should be less difficult to spot than a frivolous complaint, for the appeal is a claim that already has undergone judicial scrutiny.

Id.

283. 28 U.S.C. § 1927 (1982).

284. FED. R. CIV. P. 11 (as amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987).

Federal Rule of Civil Procedure 38 and section 1927 are more pertinent to an examination of the courts of appeals' decisions than is Rule 11 because the decision to levy sanctions under Rule 11 is within the discretion of the trial court. Hirshman, *Tough Love: The Courts of Appeals Run the Seventh Circuit the Old Fashioned Way*, 63 CHI.-KENT L. REV. 191, 199 (1987). See *Braley v. Campbell*, 832 F.2d 1504, 1510 (10th Cir. 1987) (Rule 11 allows "the imposition of sanctions at the trial level, not on appeal"); *Indianapolis Colts v. Mayor of Baltimore*, 775 F.2d 177 (7th Cir. 1985) (same).

285. See Joseph, *Rule 11 is only the Beginning*, 74 A.B.A. J. 62 (May 11, 1988).

286. See *In re Ginther*, 791 F.2d 1151, 1155-56 (5th Cir. 1986).

287. *E.g.*, *Ford v. Temple Hospital*, 790 F.2d 342, 347-49 (3d Cir. 1986) (before attorneys' fees and costs may be imposed under section 1927, there must be a finding of willful bad faith).

288. *E.g.*, *Coleman v. Commissioner*, 791 F.2d 68, 71-72 (7th Cir. 1986) (a court may and should impose sanctions if a person "should have known" that his position is groundless); *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986) (holding that there is no necessary subjective component to a proper analysis under Rule 11), *cert. denied*, 480 U.S. 918 (1987).

289. FED. R. APP. P. 38; 28 U.S.C. § 1912 (1982) (minor differences in wording). See also FED. R. APP. P. 46(b) & (c) (power to suspend, disbar, and discipline attorneys); 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3992 (1977).

290. See, *e.g.*, *Coglan v. Starkey*, 852 F.2d 806 (5th Cir. 1988); *Henry v. Farmer City State*

sanctionable include anyone who was responsible for prosecuting the frivolous appeal: the parties, including *pro se* litigants and criminal defendants, as well as their attorneys.²⁹¹ Sanctions can be imposed either *sua sponte*²⁹² or on motion. Once deemed highly unusual and quite rare, appellate sanctions seem to be becoming more common in the pages of the Federal Reporter, 2d Series.²⁹³

Beyond rule and statute, there are somewhat questionable claims of a federal court's residual inherent power to impose sanctions, such inherent powers being part of the courts' power to control and manage their jurisdiction.²⁹⁴ As with the inherent power to punish contempt, the courts of appeals may be imbued with the inherent power to impose a variety of sanctions independent of any rule or statute or limitations otherwise expressly provided. These might conceivably include: attorneys' fees awards;²⁹⁵ disbarment,²⁹⁶ suspension, disqualification or reprimand of counsel;²⁹⁷ dismissal of an appeal;²⁹⁸ or even withdrawal of a mandate obtained by a fraud on the court.²⁹⁹ There are not many decisions based on this inherent power, however, since the rule and statute have usually proven to be sufficient sanctions.

Nevertheless, there seems to be a trend towards a greater willingness to experiment with appellate sanctions.³⁰⁰ Multiple policy considerations con-

Bank, 808 F.2d 1228 (7th Cir. 1986); *Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d 468 (1st Cir. 1985).

291. See *Stelly v. Commissioner*, 761 F.2d 1113, 1116 (5th Cir.) (persons sanctionable include anyone responsible for filing the frivolous appeal), *cert. denied*, 474 U.S. 851 (1985).

292. See, e.g., *Devices for Medicine, Inc. v. Boehl*, 822 F.2d 1062 (Fed. Cir. 1987) (attorney's fees awarded *sua sponte* because appeal was frivolous and contributed to bad faith abuse of judicial process); *Brown v. Nationwide Ins. Co.*, 805 F.2d 1242 (5th Cir. 1986) (court noted that sanctions could have been imposed even if no motion had been made).

293. E.g., *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987) (en banc); *Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d 468, 471-73 (1st Cir. 1985). See generally Joseph, *supra* note 285, at 62.

294. E.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (district court may assess attorneys' fees in appropriate circumstances by invoking its inherent powers); *Link v. Wabash R.R.*, 370 U.S. 626, 633 (1962) (affirmed district court's *sua sponte* dismissal of case due to the attorney's failure to attend a pretrial conference as an appropriate exercise of the court's inherent power to manage its own affairs). See generally Note, *The Inherent Power: An Obscure Doctrine Confronts Due Process*, 65 WASH. U.L.Q. 429 (1987) (discussing the courts' exercise of inherent powers and possible alternatives).

295. *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975).

296. *Eash v. Riggins Truck, Inc.*, 757 F.2d 557 (3d Cir. 1985).

297. *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985).

298. *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987).

299. See *Brocton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5 (1st Cir. 1985).

300. E.g., *In re McDonald*, 109 S. Ct. 993 (1989) (petitioner prohibited prospectively from filing *in forma pauperis* requests for extraordinary writs in Supreme Court based on a history of filing frivolous petitions); *Urban v. United Nations*, 768 F.2d 1497, 1500 (D.C. Cir. 1985) (*pro se* litigant enjoined from filing any civil action in any federal court without first obtaining leave of the forum court).

verge here. Access to appellate courts, while not ultimately of constitutional dimension, is at least a statutory entitlement. But appeals brought only to harass or to delay, impose severe economic costs on both litigants and lawyers. Viewed systemically, frivolous appeals also divert scarce and judicial resources and serve to debase the appellate currency. Guaranteeing and policing appropriate methods and procedures for prosecuting appeals likewise are necessary aspects of the judicial administration of the courts of appeals. Consumers of judicial services, litigants and attorneys, are entitled to know what standards will be applied, and courts are entitled to expect compliance with those standards. What should be forthcoming from the judiciary, however, are more and more clear guidelines.³⁰¹

VI. APPEALS IN CRIMINAL MATTERS

A. Generally

Appeals in federal criminal matters bear a different emphasis and oblige separate treatment in this Article. When brought by a criminal defendant, an appeal generally must satisfy more closely the requirement of finality. The liberalities of interpretation of the final decision requirement and the various statutory accommodations found in civil appeals do not translate well into the criminal appeal. When brought by the government, additional special statutes must be satisfied, and there is a constitutional overlay of double jeopardy restrictions. The differences summarized here are subdivided by the identity of the appellant, either defendant or government.

B. Criminal Defendant Appeals

The especial importance of adhering to the final decision requirement in criminal cases always has been emphasized:³⁰²

These considerations of [finality] policy are especially compelling in the administration of criminal justice. . . . An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal.³⁰³

301. See *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121 (2d Cir. 1987) (Pratt, J., dissenting) (modern legal system has entered a new era of sanctions but lacks "an integrated 'code' of sanctions to supply coherent guidance").

302. See generally 15 *FEDERAL PRACTICE & PROCEDURE*, *supra* note 41, at § 3918 (1976); 9 *MOORE'S FEDERAL PRACTICE*, *supra* note 84, at ¶¶ 110.04-.05.

303. *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). But see *Houston v. Lack*, 108 S. Ct. 2379 (1988) (notices of appeal by *pro se* prisoners considered filed upon delivery to prison authorities). See generally Powell, *Federal Jurisdiction in Criminal Appeals—Appealable Orders in the Fifth Circuit*, 19 TEX. TECH L. REV. 1003 (1988).

With few statutory exceptions, the term "final decision" from section 1291 means imposition of the sentence in criminal matters.³⁰⁴ However, it is enough if the defendant is put on probation after sentence has been imposed and suspended, or the imposition of sentence has been suspended. If a sentence is imposed based on some counts but deferred on other counts, there is no final judgment. A sentence entered after either a guilty plea or a plea of *nolo contendere* is considered final, although the scope of review may be limited to jurisdictional issues.

In detail too elaborate for replication here, the courts of appeals have made several fine distinctions among and within categories of criminal trial orders.³⁰⁵ For example, orders related to grand jury proceedings sometimes

304. *E.g.*, *Parr v. United States*, 351 U.S. 513, 518 (1956); *United States v. Patterson*, 882 F.2d 595, 599-600 (1st Cir. 1989) (government has no statutory basis for appeal of district court's sentence in criminal case because sentencing is a key element of criminal prosecution and "not in any sense independent of the main course . . ." therefore not a final order nor does criminal collateral order doctrine apply), *cert. denied*, 58 U.S.L.W. 3428 (1990); *United States v. Fisher*, 871 F.2d 444, 449 (3d Cir. 1989) (district court's order denying defendants' motions to dismiss indictment not final order, nor does it constitute exception as interlocutory decision because does not satisfy third prong of test); *United States v. Consiglio*, 866 F.2d 310, 310-11 (9th Cir. 1989) (district court's denial of narcotics defendant's motion to compel release of seized funds so defendant could retain counsel was not final order under section 1291, nor was it appealable under collateral order exception); *United States v. Slay*, 858 F.2d 1310, 1313-14 (8th Cir. 1988) (district court's modification of criminal indictment was interlocutory and nonappealable); *United States v. Midland Asphalt Corp.*, 840 F.2d 1040, 1046 (2d Cir. 1988) (because order denying motion to dismiss indictment for alleged violation of FED. R. CRIM. P. 6(e) is likely to be appealable following trial, order not subject to interlocutory appellate review), *aff'd*, 109 S. Ct. 1494 (1989); *United States v. Bratcher*, 833 F.2d 69, 72 (6th Cir. 1987) (order denying defendant's motion to dismiss on basis of CRIM. R. 48(b) with prejudice and granting motion to dismiss on basis of Speedy Trial Act without prejudice was not within *Cohen* exception to final order doctrine and appeal dismissed), *cert. denied*, 484 U.S. 1030 (1988); *United States v. Bird*, 709 F.2d 388, 389-90 (5th Cir. 1983) (criminal defendant's claim that interlocutory appeal seeking to enforce agreement by Assistant United States Attorney not to prosecute was not final or collateral order exception and appeal dismissed); *United States v. Brizendine*, 659 F.2d 215, 218 (D.C. Cir. 1981) (court lacked jurisdiction to review appeals by defendants after district court denied motion to dismiss indictment on due process grounds relating to plea bargaining process). *Compare In re Grand Jury Subpoena*, 873 F.2d 170, 173 (7th Cir. 1989) (order disqualifying government counsel in criminal case was final collateral order immediately appealable under section 1291 because: 1) conclusively determines disputed question; 2) resolves important issue completely separate from merits of underlying action; and, 3) is effectively unreviewable following trial); *United States v. Smith*, 851 F.2d 706, 708 (4th Cir. 1988) (order denying defendant's motion to dismiss indictment was appealable under exception to final decision requirement where order granted government's motion to try defendant as adult even though he was fifteen years old at time of actual crime); *United States v. C.G.*, 736 F.2d 1474, 1476-77 (11th Cir. 1984) (district court's order denying juvenile defendant's motion to strike certification and granting government's motion to transfer was appealable collateral order). *See* 18 U.S.C. § 3742(a) (Supp. IV 1986) (broadening review of sentences imposed under federal sentencing guidelines). *See also* *Mistretta v. United States*, 109 S. Ct. 647 (1989) (upholding scheme of federal sentencing guidelines).

305. These distinctions most often are made under the "collateral order" doctrine of *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 545-47 (1949). Although *Cohen* was a civil case, the

are and sometimes are not deemed final. A denial of a motion to dismiss an indictment usually is not final, nor are orders related to a bill of particulars.³⁰⁶ Orders granting or denying discovery are ordinarily not final and appealable, unless they are not part of a continuing pretrial proceeding. For the most part, denials of motions to suppress evidence are not final.³⁰⁷ If deemed separable, an order restraining a defendant's property pending trial may be deemed appealable.³⁰⁸ Denial of a motion for a speedy trial ordinarily is not final.³⁰⁹ These and sundry other orders at criminal trials disposing of pretrial, trial and post trial motions "may present puzzling questions"³¹⁰ and therefore require independent assessment against precedent and the policy of finality.

Interlocutory appeals in criminal matters likewise are more restrictive than on the civil side. The most general and commonly used statutes for interlocutory appeals in civil matters simply do not apply. For example, section 1292(a) entitled interlocutory appeals,³¹¹ and section 1292(b) permissive interlocutory appeals,³¹² are expressly limited to civil actions. The jurisdiction to issue extraordinary writs applies in criminal and civil matters, although the restricted attitude toward the writs is exaggerated further by the heightened importance afforded the final decision requirement on the criminal side.³¹³

Aside from the collateral orders sometimes judicially treated as final and mentioned already, other matters are provided an interlocutory appeal by specific statute. The Bail Reform Act of 1984³¹⁴ creates the most significant statutory exception to this regime of finality.³¹⁵ Appeals from a release or detention order or from an order denying revocation or amendment of such an order must satisfy 28 U.S.C. § 1291 finality, if brought by an accused,

collateral order doctrine also applies to criminal cases. See *Cobbledick v. United States*, 309 U.S. 323, 328-29 (1940). See generally 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3918 (1976); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶¶ 110.05, .13[3] & .13[11].

306. E.g., *Cobbledick*, 309 U.S. at 327-28; *In re Grand Jury Matter*, 802 F.2d 96, 98 (3d Cir. 1986); *United States v. Martin*, 682 F.2d 506 (5th Cir. 1982). But see *United States v. Nixon*, 418 U.S. 683, 690-92 (1974) (the President may appeal motion to dismiss subpoena *duces tecum* immediately, due to separation of powers issue).

307. *DiBella v. United States*, 369 U.S. 121, 131 (1969).

308. *Id.* at 131-32.

309. *United States v. MacDonald*, 435 U.S. 850, 858-61 (1978).

310. 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3918 (Supp. 1989).

311. See *supra* Part IV(B).

312. See *supra* Part IV(C).

313. E.g., *Will v. United States*, 389 U.S. 90, 96 (1967). See generally Note, *Time is of the Essence: The Case for Amending 28 U.S.C. § 1292(b) to Permit Interlocutory Appeals in Criminal Cases*, 1989 ARIZ. ST. L.J. 727.

314. 18 U.S.C. §§ 3141-3145 (Supp. II. 1984). See also *Stack v. Boyle*, 342 U.S. 1, 6-7 (1951) (proper procedure for challenging unlawfully fixed bail).

315. See also *United States v. Salerno*, 481 U.S. 739 (1987) (motion to reduce bail appealable); *Stack v. Boyle*, 342 U.S. 1, 6-7 (1951) (same).

or the restrictions on government appeals, if brought by the prosecution.³¹⁶ The new scheme permits a defendant to appeal only after the order to detain pending trial, or the conditions imposed on an order to release, have been passed on by the district court.³¹⁷

Last mentioned is the constitutional possibility for interlocutory appeal under the former jeopardy provision. Unlike other motions with constitutional overtones, such as motions to suppress or motions for a speedy trial,³¹⁸ the denial of a motion to dismiss an indictment for former jeopardy is subject to interlocutory appeal.³¹⁹ As with other interlocutory appeals, the district court must fully decide the question; and the matter itself must be separable from the issue on the merits, and former jeopardy is separate from guilt or innocence. The substantive right here informs the procedure; because the right is not to be subjected to a second trial, only an interlocutory appeal can protect it.³²⁰ This notion of a constitutionally-based interlocutory appeal has not been extended to other rights.³²¹

C. Government Appeals

The government has no right to appeal in federal criminal cases unless the appeal is expressly authorized by statute.³²² Furthermore, statutory authorization must comport with the fifth amendment former jeopardy protection. Furthermore, any interlocutory government appeal must not unduly postpone the proceeding sufficiently to violate the defendant's constitutional and statutory right to a speedy trial. For the most part, however, the government does not generally rely on the jurisdictional provision over final judgments in section 1291.³²³ Rather, section 3731 of Title 18 is the basic

316. See also 18 U.S.C. § 4208(b) (1982); *Corey v. United States*, 375 U.S. 169, 173-74 (1963) (alternate appeals allowed upon indeterminate commitment to develop information for sentence).

317. 18 U.S.C. § 3145(c) (Supp. IV 1986). See *infra* Part VI(C). See also FED. R. APP. P. 9(b) (court of appeals or circuit judge may authorize bail pending appeal, although application should first be made in district court).

318. *DiBella v. United States*, 369 U.S. 121, 131-32 (1962).

319. *United States v. MacDonald*, 435 U.S. 850, 853-56 (1978).

320. *Abney v. United States*, 431 U.S. 651, 656-62 (1977). See also *Richardson v. United States*, 468 U.S. 317, 326 n.6 (1984) (extension to improper mistrials); cf. *Helstoski v. Meanor*, 442 U.S. 500, 505-08 (1979) (denial of motion to dismiss based on speech or debate clause held appealable); *United States v. Murphy*, 642 F.2d 699, 700 (2d Cir. 1980) (per curiam) (same). But see *United States v. Dunbar*, 611 F.2d 985, 988 (5th Cir.) (en banc) (frivolous claim does not divest district court of jurisdiction, but court should make written finding when denying claim), *cert. denied*, 447 U.S. 926 (1980).

321. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

322. See, e.g., *United States v. Patterson*, 82 F.2d 595, 596 (1st Cir. 1989) (government did not have right to appeal district court's sentence in case where district court held that defendant's prior convictions did not qualify as predicate offense for sentence enhancement), *cert. denied*, 58 U.S.L.W. 3428 (1990). See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3919 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 110.04, .19[7].

323. *Carroll v. United States*, 354 U.S. 394, 400 (1957). But see *Arizona v. Manypenny*, 451

authorizing statute.³²⁴ Appeals are authorized from three separate categories of orders: (1) a final order dismissing an indictment or information or granting a new trial after verdict or judgment on any one or more counts—unless the former jeopardy clause prohibits further prosecution;³²⁵ (2) an interlocutory order suppressing or excluding evidence or requiring the return of property;³²⁶ and, (3) an interlocutory order granting the release of the

U.S. 232, 241-50 (1981) (appeal by state from adverse judgment when criminal proceeding removed to federal court); 28 U.S.C. §§ 2253, 2255 (1982) (section 1291 applies in proceedings to vacate sentence). See generally 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3919 (1976).

324. 18 U.S.C. § 3731 (Supp. IV 1986). See also *supra* Part V(C) (government may petition for extraordinary relief).

325. *E.g.*, United States v. Spilotro, 884 F.2d 1003, 1005-06 (7th Cir. 1989) (dismissed government appeal of district court's order reducing defendant's sentence because no jurisdiction under either sections 3731 or 1291); United States v. Patterson, 882 F.2d 595, 597-99 (1st Cir. 1989) (government had no authorization to appeal district court's sentence where district court held that defendant's prior convictions did not qualify as predicate offenses for sentence enhancement under 18 U.S.C. § 924(e); however appellate court reversed under mandamus authority), *cert. denied*, 58 U.S.L.W. 3428 (1990); United States v. Hundley, 858 F.2d 58, 59 (2d Cir. 1988) (government's appeal from order granting defendant's motion to set aside fifteen year sentence was dismissed because what in form was appeal from granting of motion under section 2255 was in substance an unauthorized appeal by government from five year sentence); United States v. Bjerke, 796 F.2d 643, 646 (3d Cir. 1986) (double jeopardy clause presented no bar to court's review of district court's order vacating convictions entered by magistrate); United States v. Martinez, 763 F.2d 1297, 1308-11 (11th Cir. 1985) (double jeopardy clause did not bar appellate court's jurisdiction over government's appeal from final judgment of acquittal of defendant entered upon retrial); United States v. Ember, 726 F.2d 522, 523-25 (9th Cir. 1984) (appeal from district court's judgment of acquittal barred by double jeopardy clause because reversal would necessitate second trial); United States v. Harshaw, 705 F.2d 317, 319-20 (8th Cir. 1983) (section 3731 authorizes government appeal from order granting defendant's motion for mistrial and double jeopardy clause no bar because trial was terminated at defendant's request); United States v. Singleton, 702 F.2d 1159, 1161-62 (D.C. Cir. 1983) (post-verdict judgments of acquittal based on insufficiency of evidence may be appealed under 18 U.S.C. § 3731, and double jeopardy clause was no bar to appeal because reversal would not require new trial); United States v. Rothfelder, 474 F.2d 606, 608 (6th Cir. 1973) (government appeal of district court's dismissal of indictment not authorized under section 3731 where district court based dismissal on extraneous facts so that its judgment operated as acquittal), *cert. denied*, 413 U.S. 922 (1973).

326. *E.g.*, United States v. Bouthot, 878 F.2d 1506, 1510 (1st Cir. 1989) (under section 3731, government was entitled to appeal district court's order granting motion to suppress evidence because evidence was "substantial proof of a fact material in the proceeding"); United States v. Eccles, 850 F.2d 1357, 1359-60 (9th Cir. 1988) (government's appeal from order granting in part and denying in part defendant's motion to suppress evidence was authorized under section 1331; delayed filing of section 3731 certificate did not destroy appellate jurisdiction but in future court warned it would not tolerate tardiness); United States v. Kepner, 843 F.2d 755, 760-61 (3d Cir. 1988) (government not estopped from raising appeal of order suppressing evidence after it stated it would not do so, where orders to suppress evidence were made before defendants were put in jeopardy and before verdict was rendered in indictment); United States v. Kington, 801 F.2d 733, 736 (5th Cir. 1986) (government entitled to appeal of order suppressing evidence after jury was empaneled and sworn in case where judge later ended trial by discharging jury on condition that defendant agree to waive double jeopardy claims); United States v.

defendant, before or after conviction, or denying the government's motion to revoke or to modify the conditions of release.

The first category, with its incorporation by reference, is essentially shorthand for the former jeopardy protection in the fifth amendment. Although section 1291 is not the jurisdictional basis, that finality test is the first criterion for these appeals under section 3731, with few specifically identified statutory exceptions. Double jeopardy principles³²⁷ prohibit the government from taking an appeal from a not guilty verdict and, further, prevent the government from relitigating any issue that directly informed that verdict. Appeals are permitted from orders entered before jeopardy attaches which occurs when the jury is sworn or when the first witness is sworn in a bench trial. Once jeopardy has attached, any acquittal on the merits will bar retrial and hence an appeal. If a jury returns a verdict, there is no right of government appeal if the verdict acquits the defendant, but an appeal may be taken if the jury convicts and the judge thereafter absolves the defendant. The statutory intent is understood to mean to permit all government appeals within the judicial limner of the constitutional limit. An appeal by the government does not allow the defendant, by cross-appeal, to raise issues beyond those related to a judgment of dismissal.³²⁸ Beyond these basic rules, however, the decisional law on double jeopardy and government appeals is currently in a state of flux.³²⁹

The second category in section 3731, appeals from orders suppressing or excluding evidence or requiring the return of property, is designed to permit a government appeal of an order that as a practical matter eliminates the prosecution's case. Otherwise, an acquittal could result from an improvident suppression. Although appeals under this provision are liberally allowed, this

Posner, 764 F.2d 1535, 1538 (11th Cir. 1985) (section 3731 entitled government to appeal district court's order excluding evidence entered before retrial, because defendant filed motion granting severance), *cert. denied*, 476 U.S. 1182 (1986); *United States v. Shears*, 762 F.2d 397, 400 (4th Cir. 1985) (where defendant himself moved for mistrial and specifically waived any double jeopardy claim, court of appeals had jurisdiction over government appeal of district court's suppression order).

327. See generally W. LAFAVE & J. ISRAEL, *supra* note 47, at §§ 24.1-24.5 (1985).

328. See *supra* Part II(C).

329. See, e.g., *Sanabria v. United States*, 437 U.S. 54 (1978) (double jeopardy a bar to multiple prosecutions of different elements of same offense); *Finch v. United States*, 433 U.S. 676 (1977) (double jeopardy a bar to appeal of an information dismissed for failure to state offense); *Lee v. United States*, 432 U.S. 23 (1977) (petitioner's retrial after dismissal of defective information at his request not violation of double jeopardy clause); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (double jeopardy a bar to appellate review and retrial following acquittal under Rule 29(c)); *Serfass v. United States*, 420 U.S. 377 (1975) (no double jeopardy bar to appeal by United States from pre-trial order dismissing indictment); *United States v. Jenkins*, 420 U.S. 358 (1975) (double jeopardy a bar to further proceedings after acquittal), *overruled in part*, *United States v. Scott*, 437 U.S. 82, 95-101 (1978) (no double jeopardy bar to appeal where defendant successfully terminated trial prior to submission to judge or jury as to guilt or innocence); *United States v. Wilson* 420 U.S. 332 (1975) (no double jeopardy bar to appeal if judge rules for defendant after guilty verdict entered).

is to be contrasted with the general rule that denials of a defendant's motion to suppress are not appealable.³³⁰ Upon filing the required certificate of good faith and importance, the government may appeal the suppression of evidence based on the exclusionary rule or any other reason.³³¹

The third category in section 3731, the bail appeal provision, must be read together with The Bail Reform Act of 1984, section 3742 of Title 18.³³² These statutes together provide for plenary review of bail decisions adverse to the government. The particular procedures to be followed and the standards to be applied, however, are beyond the scope of this Article.

Finally, beyond section 3731, the government's right to appellate review of sentences was broadened in 1984, along with the defendant's, by statute.³³³ Section 3742 of Title 18 authorizes the government to appeal, in terms parallel to the defendant's authorization, if a sentence is imposed in violation of the law, or resulted from an incorrect application of the federal sentencing guidelines, or violated the terms of a plea agreement.³³⁴

VII. APPEALS IN ADMINISTRATIVE MATTERS

A. Generally

The courts of appeals have jurisdiction to review administrative actions of dozens of federal agencies, boards, and even individual government officials. These reviews account for upwards of ten percent of the federal appellate docket. The substantive law and procedural rules are adjectival to the subject of administrative law and this Article must therefore defer to treatises on that larger subject.³³⁵

Judicial review of administrative agency action may take the form of "nonstatutory" review by suit against the officer or agency in the district court under some general heading of subject matter jurisdiction with an appeal to the court of appeals.³³⁶ With the growth of the modern adminis-

330. See *supra* Part VI(B).

331. See also 18 U.S.C. § 2518(10)(b) (1982) (interlocutory appeal of suppression orders in wiretaps); 18 U.S.C.A. § 7 (West Supp. 1985) (interlocutory appeal under Classified Information Procedures Act).

332. 18 U.S.C. §§ 3141-3148 (1982).

333. See *supra* note 303.

334. 18 U.S.C. § 3742(b) (Supp. IV 1986). See *Mistretta v. United States*, 109 S. Ct. 647 (1989) (upholding scheme of sentencing guidelines).

335. See Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986). See generally 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 23.1-23.22 (2d ed. 1983); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATION ACTION* (1965).

336. 5 U.S.C. §§ 702, 703 (1982). These "nonstatutory" actions may include actions for declaratory judgments, writs of mandamus or habeas corpus. *Id.* Other forms of action which may be allowed include, but are not limited to, tort suits against government officers and suits brought under the doctrine of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See K. DAVIS, *supra* note 335, at § 23:1; see generally 14 *FEDERAL PRACTICE & PROCEDURE*, *supra* note 41, at § 3655 (2d ed. 1985); 3A J. MOORE, J. LUCAS & G. GROTHEER, *MOORE'S FEDERAL PRACTICE* ¶ .65[2.-1] (1989).

trative state, however, Congress has experimented with two other review models. Some statutes authorize a priority suit to enjoin an agency order before a three-judge district court, with direct appeal as of right to the Supreme Court. This model has fallen from favor, however, for many of the reasons that the three-judge court has come to be considered somewhat anachronistic, although there are still a few statutes which follow this procedure.³³⁷ Beginning with the Federal Trade Commission Act of 1914,³³⁸ Congress authorized an exclusive jurisdiction in the (then-circuit) courts of appeals to affirm, enforce, modify, or set-aside orders of the agency, with a subsequent discretionary review in the Supreme Court. Since 1950, this latter review model has been preferred and has become dominant.³³⁹

In the prevailing review model, the agency performs as a trial court through an administrative law judge who hears evidence, develops a record, and makes the initial decision on issues of law and fact. Most commonly, there is a subsequent intra-agency appeal before some agency review panel. Judicial review in the court of appeals thereafter deals, for the most part, with questions of law or reviews the record for substantiality of the evidence.

Numerous statutes provide for review in the courts of appeals, sometimes exclusively in the Court of Appeals for the District of Columbia, and a treatise disclaimer applies more intently to this Article: "Complete enumeration of the statutes would be too lengthy to serve any useful purpose, even if it were possible to be confident that a complete list could be prepared."³⁴⁰ Issues on appeal might range from a claim for individual compensation under a government entitlement program to an environmental issue with national impact. Statutes either expressly require that rules be adopted by an order made reviewable or simply provide for judicial review of all orders. Courts seem to vacillate between polar approaches, one approach seems to be preoccupied with procedural and jurisdictional matters and the other approach seems to be characterized by a zeal to reach and to resolve the merits.³⁴¹ For example, the answer varies from statute to statute and differs from circuit to circuit as to whether a statutory authorization to review administrative "orders" does include judicial review of agency rules and regulations.

The notion of limited jurisdiction is important in understanding judicial review of administrative agency decisions.³⁴² As interpreted, the judicial review provisions of the Administrative Procedure Act do not confer juris-

337. See Act of January 2, 1975, Pub. L. No. 93-584, 88 Stat. 1917 (orders of the Interstate Commerce Commission made reviewable by court of appeals). Compare 28 U.S.C. § 1336(a) (1982) (district court review of orders to pay) with §§ 2321-2323, 2342(5) (1982) (court of appeals review of all other orders). See also *supra* Part I(E).

338. Act of September 26, 1914, ch. 311, § 5, 38 Stat. 717, 720 (codified at 15 U.S.C. § 45(c) (1982)).

339. See 28 U.S.C. §§ 2341-2351 (1982). See also Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 5 (1975).

340. 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3941 (1977).

341. See K. DAVIS, *supra* note 335, at § 23.2.

342. See *supra* Part I(C).

diction,³⁴³ but only prescribe procedures when a court of appeals is granted review power by some other statute.³⁴⁴

The procedure for transferring an administrative appeal from one court of appeals to another depends on section 2112(a) of Title 28,³⁴⁵ and a seldom invoked but recognized additional, inherent power.³⁴⁶ Typically, a need for the transfer mechanism arises when multiple petitions for review of a single administrative order are filed in different circuits.³⁴⁷ Multiple filings are made possible by alternative grants of jurisdiction to review in more than one circuit. For example, a statute might authorize a person aggrieved by an order to file a petition for review wherever the person resides or does business, or where the regulated activity took place, or in the District of Columbia. Different parties affected by the order may prefer review in different circuits, and the so-called "race to the courthouse" is on. Under the old first-to-file rule of jurisdiction, differences of minutes often controlled. Congress recently responded to the waste of judicial resources in multiple filings and in prolonged proceedings for transfer in such situations to create simple and clear "rules of the road." Under the new statute, if two or more petitions for review are filed in two or more courts of appeals within 10 days of the administrative order, then the matter is referred to the judicial panel on multidistrict litigation which will assign the petitions randomly to one of the courts in which a petition was filed.³⁴⁸ The panel on multidistrict litigation has, in turn, proposed rules of procedure, not adopted as of the time of this writing, to handle multiple filings.³⁴⁹

B. Finality and Exclusivity

Some of the myriad of statutes providing for court of appeals review explicitly require a "final order"³⁵⁰ while others have been interpreted to impliedly require finality.³⁵¹ As the final decision requirement serves to order

343. 5 U.S.C. §§ 701-706 (1982). See *Califano v. Sanders*, 430 U.S. 99, 105 (1977). In *Califano*, the Court found it unnecessary to reach the question of whether the Administrative Procedure Act constituted an independent grant of jurisdiction because Congress had recently removed the jurisdictional amount requirement from federal question jurisdiction under 28 U.S.C. § 1331. *Id.*

344. See, e.g., 28 U.S.C. §§ 2341-2351 (1982) (orders of specified agencies subject to review in the courts of appeals).

345. 28 U.S.C. § 1221(a) (1982).

346. See *supra* Part V(D) (inherent power to sanction). See also *supra* Part II(G) (transfers for want of jurisdiction under 28 U.S.C. § 1631).

347. See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3944 (1977); 9 MOORE'S FEDERAL PRACTICE, *supra* note 84, at ¶ 0.146[10].

348. Selection of Court for Multiple Appeals, Pub. L. No. 100-236, §§ 1, 3, 101 Stat. 1731, 1732 (to be codified as amended 28 U.S.C. 2112(a)).

349. Proposed Rules for Multicircuit Petitions for Review under 28 U.S.C. § 2112(a)(3) (found at 840 F.2d No. 2, at ci-cxvii (Mar. 31, 1988)). See also *supra* Part II(E).

350. E.g., 28 U.S.C. § 2344 (1982).

351. E.g., *Federal Power Comm. v. Metropolitan Edison Co.*, 304 U.S. 375, 384 (1938) (provision of Federal Power Act "relates to orders of a definitive character").

the relationship of appellate court with the trial court, the final administrative order requirement does the same for both appellate court and agency.³⁵² On the administrative side, finality is related to the doctrine that requires the exhaustion of administrative remedies.³⁵³ The party seeking judicial review, generally, must pursue administrative remedies provided for by statute or agency rule. And most agency review statutes preclude consideration of matters not first raised before the agency, although the failure may be excused on a proper showing.³⁵⁴ Nevertheless, finality is something of an empty vessel to be given content by the courts.

In administrative matters, the Supreme Court has cautioned "the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable."³⁵⁵ The finality requirement is to be applied "pragmatically . . . focusing on whether judicial review at the time will disrupt the administrative process."³⁵⁶ The requirement is treated as jurisdictional and these purposes are reflected in applications.³⁵⁷ The interplay of the need for present judicial review and the finality concept is manifested again in a small but growing number of decisions allowing interlocutory review of agency action through the extraordinary writs.³⁵⁸ These decisions build on the unremarkable use of mandamus against an agency ignoring the mandate of a court of appeals after review.

The principle of exclusivity is distinct from that of finality.³⁵⁹ The particular statute providing for judicial review of an agency order may provide explicitly that the jurisdiction of the court of appeals is exclusive; or district court review of matters within that jurisdiction may be precluded by implication.³⁶⁰ Of course, if the particular matter does not come within the grant of appellate

352. See generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3942 (1977).

353. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

354. Compare *EEOC v. FLRA*, 476 U.S. 19, 22-23 (1986) (claim not previously urged before NLRB barred by court) with *McKart v. United States*, 395 U.S. 185, 193-95 (1969) (failure excused because administrative process had ended and party faced criminal prosecution).

355. *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976).

356. *Bell v. New Jersey*, 461 U.S. 773, 779 (1983), citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 239 (1980); *Port of Boston Marine Terminal Assoc. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970); see also *Abbot Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

357. In fact, courts will raise the issue themselves, even if the parties fail to do so. 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3942 (1977). *E.g.*, *FTC v. Standard Oil Co.*, 449 U.S. 232, 246 (1980).

358. See *supra* Part V(C).

359. See *FTC v. Standard Oil*, 449 U.S. at 243; see generally 16 FEDERAL PRACTICE & PROCEDURE, *supra* note 41, at § 3943 (1977) (appellate review is exclusive method of review of administrative decisions); 3B J. MOORE & J. KENNEDY, *MOORE'S FEDERAL PRACTICE* ¶ 24.06[3.-3] (1987) (discussing judicial review of agency orders).

360. *E.g.*, 15 U.S.C. § 45(d) (1982) (explicit); *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422 (1965) (where Congress has enacted a specific statutory scheme of judicial review by specific appellate courts, doctrine of exhaustion requires exclusive adherence to that scheme).

jurisdiction, then the exclusivity principle cannot apply to preempt district court review.³⁶¹ Additionally, exclusivity may be excused to allow immediate district court review of a matter that eventually would be reviewable in the court of appeals upon a demonstration akin to the showing required for injunctive relief: if the right being asserted is clear and important, especially if it is a constitutional right, and the harm will be irreparable if consideration is postponed until later review in the court of appeals. This possibility is a rare but noteworthy exception to the general exclusivity principle.

VIII. CONCLUSION

The ultimate two concerns behind the various principles of appellate jurisdiction are clarity and capacity. A final concept of closure might also be noted.

Clarity in these principles minimizes the undesirable, though inevitable, litigation over jurisdiction, thus furthering efficiency in the court system. For most questions in most appeals today, the issue of jurisdiction is readily apparent. The rules as stated appear to be clear enough, although their application may be somewhat sophisticated and complex. In those few remaining appeals in which the power to hear an appeal is uncertain, the lack of clarity over appellate jurisdiction may be attributed to a purposeful pragmatism that has characterized the courts in their administration of the jurisdictional rules—an effort, in short, to avoid automatic or extreme approaches. Therefore, it might be suggested that some of the uncertainty in the theory is by design.

As for capacity, the concern is to define appellate jurisdiction to keep appellate caseloads manageable. Statutory and decisional policies relating to appellate jurisdiction have not contributed appreciably to the current docket crisis at the courts of appeals, but that is a small comfort. Congress has failed to keep judicial capacity in line with caseload demands. Since 1960, circuit judgeships have more than doubled, yet the number of annual appeals filed has increased nearly by a factor of ten. Such considerations, however, go beyond the focus of an article on appellate jurisdiction.³⁶²

Viewed most broadly and cumulatively, the various statutes and case decisions on appealability structure a relationship between the reviewing court and the court being reviewed. In this relationship, everything is reviewable, in its own way and at its own time. Every order that a district court enters or fails to enter may be reviewed. This may be described as the concept of “closure” in federal appellate jurisdiction. The various sections

361. Cf. *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468-69 (1984) (interpreting scope of exclusive jurisdiction).

362. See generally Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 U. FLA. L. REV. 225 (1985). See generally P. Carrington, *Civil Appellate Jurisdiction* (pts. 1 & 2), 47 LAW & CONTEMP. PROB. 1-248, 1-179 (1984) (Part I, in form, a restatement; Part II provides comparative perspective).

of this Article are cumulative; the different bases for appellate review are best considered aggregately and alternatively. The appropriate methodology is to go down the outline like a checklist to determine if there is one or more basis for appellate review either now or later.

The Supreme Court itself has warned: "No verbal formula yet devised can explain prior [appellate jurisdiction] . . . decisions with unerring accuracy or provide an utterly reliable guide for the future."³⁶³ The challenge then for the theorist-practitioner of appellate jurisdiction is to know "when" and "how" and to try to understand "why." Such an understanding takes us a step closer toward a unified theory of the jurisdiction of the United States Courts of Appeals.

363. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

